contends that such actuarial computations having been made, *Estate of Pompeo M. Maresi*, 6 T. C. 582, affd. 156 F. 2d 929, is applicable and sustains petitioner. Petitioner points out that in the *Maresi* case, both the Tax Court and the Second Circuit distinguished *Humes* v. *United States* and *Robinette* v. *Helvering*, both *supra*, upon which respondent relies, and petitioner contends that substantially the same distinction as existed in the *Maresi* case exists here. We agree with petitioner.

Petitioner presented reliable and conservative actuarial testimony to estimate the value of the contingent remainder to charity at the date of decedent's death to support his deduction of $179,154.19. We do not feel that we are at liberty to disregard this testimony of competent actuaries who have made their computations in accordance with what appear to be well recognized actuarial methods.

In *Estate of Pompeo M. Maresi, supra*, we held that the commuted value of the liability of decedent's estate for payments to decedent's wife until she should die or remarry were deductible from decedent's gross estate in an amount determinable by reference to American Experience Tables reflecting life expectancy and the probability of the remarriage of widows. In that case, among other things, we said:

[Tr. 24]

> And, of course, it can not be said here as in the *Robinette* case that petitioner has referred us to no method for determining the value of the interest in question. Although it is true that a marriage table was offered in the *Humes* case, it appeared to relate solely to experience among women in the Scotch peerage, while the table proffered here is based upon American statistics.

Following the principle which we announced in the *Marcsi* case, *supra*, and which was affirmed by the Second Circuit, we hold in petitioner's favor on Issue 1.

In the first computation made by petitioner's actuary he determined that the present value of the charitable remainder under the will of the decedent at date of death was $.24094 per dollar represented in the one-half of the estate which may go to charity. In a supplemental valuation based upon the effect upon the remainder value of the contingency of illegitimate issue the actuary reaches a slightly lower figure. In this supplemental computation the actuary reaches the conclusion that the net result is that the increased probability of issue reduces the value per dollar of remainder to charity from $.24094 to $.24058. This supplemental actuarial computation concludes with this statement: "It is our opinion that the figure of $.24058 does make full provision for the probability of issue, whether or not legitimate." In a recomputation under Rule 50 of the deduction for charitable bequests this figure of $.24058 should be used instead of the figure $.24094.

* * * * * * * * *

[Tr. 25]

*Decision will be entered under Rule 50.*

---

[Tr. 26]

[Caption]

**Decision**

On July 31, 1952, Findings of Fact and Opinion were promulgated in this proceeding. At the conclusion of the opinion it was stated "Decision will be entered under Rule 50." On November 5, 1952, respondent filed his computation for entry of decision. On November 28, 1952, petitioner filed its computation for

FILE COPY

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 24

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 2, 1954

CERTIORARI GRANTED APRIL 5, 1954

entry of decision. These computations differed and were set for hearing in Washington, D. C., December 3, 1952. On that date both parties appeared and were heard in support of their respective computations. Their arguments have been fully considered.

Premises considered, it is believed the following decision should be entered:

ORDERED and DECIDED, that there is an overpayment in the estate tax of petitioner in the amount of $91,539.02, of which $24,798.25 was paid within three years before the mailing of the notice of deficiency, which notice was mailed within three years from the filing of the return, and $66,740.77 was paid after the mailing of the notice of deficiency.

(Signed) EUGENE BLACK
*Judge*

Entered Dec. 29, 1952.

[Seal of the Tax Court]

---

[Tr. 27]

[Caption]

**Stipulation of Facts**

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. The petitioner is the Executor of the Last Will and Testament of Louis Sternberger, deceased.

2. The decedent Louis Sternberger died June 25, 1947, a resident of Scarsdale, New York.

3. The Federal estate tax return was filed on September 24, 1948, with the Collector of Internal Revenue for

# INDEX


| | Page |
|---|---|
| Docket Entries | 2 |
| Findings of Fact and Opinion of the Tax Court | 2 |
| Decision | 11 |
| Stipulation of Facts | 12 |
| Exhibit 1 Attached to Stipulation | 15 |
| Exhibit 2 Attached to Stipulation | 19 |
| Transcript of Hearing | 22 |
| Taxpayer's Witnesses: | |
| David Silverman | 22 |
| Richard Fodelier | 36 |
| Taxpayer's Exhibit 3 | 47 |
| Taxpayer's Exhibit 4 | 50 |
| Taxpayer's Exhibit 5 | 51 |
| Taxpayer's Exhibit 6 | 57 |
| Taxpayer's Exhibit 7 | 59 |
| Taxpayer's Exhibit 8 | 60 |
| Proceedings in the United States Court of Appeals for the Second Circuit | 63 |
| Appendix to brief for respondent's | 63 |
| Exhibit 2—Amendments and modifications to last Will and Testament | 63 |
| Excerpts from proceedings before the Tax Court of the United States | 65 |
| Opinion, per curiam | 66 |
| Judgment | 67 |
| Clerk's certificate | 67 |
| Order granting certiorari | 69 |

the 14th District of New York, disclosing a gross estate of $2,406,541.71, a net taxable estate for purposes of the basic estate tax of $2,024,346.55, and a net taxable estate for purposes of the additional estate tax of $2,064,346.55.

4. Decedent owned improved realty known as 2 Oak Lane, Scarsdale, New York, which property was included in the Federal estate tax return at a valuation of $65,000.00. The said realty had a fair market value on the optional valuation date, June 25, 1948, of $55,000.00.

[Tr. 28]

5. The gross estate of the decedent for Federal estate tax purposes consisted of certain assets which he owned at the date of his death and certain other assets held in a revocable trust of which the decedent was the settlor and primary life beneficiary. The revocable trust was created on January 20, 1931, and was amended from time to time by the decedent. The provisions of said trust effective at the death of the decedent are set forth in Exhibit "1" hereto annexed.

6. A copy of the Last Will and Testament of the decedent, dated July 24, 1944, and the codicil thereto, dated October 20, 1945, are annexed hereto as Exhibit "2".

7. In the Federal estate tax return of the decedent a deduction was claimed under section 812(d) of the Internal Revenue Code, in the amount of $180,154.19, of which $1,000.00 represented an outright bequest to Seamen's Church Institute of America. The sum of $179,154.19 represented the alleged value of the contingent charitable remainders referred to in Exhibits "1" and "2".

8. The decedent's wife, Eunice E. Sternberger, survived the decedent and was sixty-two years of age at the date of decedent's death. She has always resided in the United States.

9. The decedent's daughter, Eunice P. Sternberger, survived the decedent, and was twenty-seven years of age at the date of decedent's death. She had been previously married, which marriage terminated in divorce on March 31, 1944. At the date of decedent's death she was then unmarried and had had no children. Said daughter is a white female and has always resided in the United States.

10. The deduction for the amount of additional legal

[Tr. 29]

fees paid or to be paid to Messrs. Greenbaum, Wolff & Ernst by the petitioner for legal services rendered and disbursements shall be determined under Rule 50 of the Rules of Practice of The Tax Court.

11. The New York estate tax return of the decedent was filed with the New York State Tax Commission in Albany, New York, on October 28, 1948, and no final order has been entered in said proceeding. The following New York estate taxes have been paid to the State of New York in respect of property included in the gross estate of the decedent:

| | |
|---|---|
| December 10, 1947 | $154,137.50 |
| February 3, 1948 | 1,920.00 |
| Total | $156,057.50 |

[Signatures omitted]

IN THE

# United States Court of Appeals
# For the Second Circuit

---

No.

---

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor, *Respondent*

---

**On Petition for Review of the Decision of the Tax Court of the United States**

---

## APPENDIX TO THE PETITIONER'S BRIEF

[Tr. 1]

Docket No. 31348

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

APPEARANCES:

For Petitioner: William F. Wolff, Jr., Esq.; Maurice C. Greenbaum, Esq.

For Respondent: Thomas R. Charshee, Esq.; R. C. Whitley, Esq.

**Docket Entries**

*1950*

Nov. 13—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 18—Answer filed by General Counsel.

*1951*

Nov. 15—Hearing had before Judge Black, on merits. Stipulation of facts and exhibits 1 and 2 filed at hearing. Appearance of Maurice C. Greenbaum filed. Briefs due 1/20/52. Replies due 2/10/52.

*1952*

Jul. 31—Findings of fact and opinion rendered, Black, *Judge*. Decision will be entered under rule 50. Copy served.

Dec. 29—Decision entered, Black, *Judge*, Div. 15.

*1953*

Mar. 24—Petition for review by U. S. Court of Appeals, Second Circuit, filed by General Counsel.

Mar. 26—Notice of filing petition for review mailed to William F. Wolff, Jr., attorney, filed by General Counsel.

---

[Tr. 15]

[Caption]

**Findings and Opinion of the Tax Court**

18 T. C. 836

Docket No. 31348. Promulgated July 31, 1952.

1. A contingent remainder of a trust and the residue of a will went to charity, and a charitable deduction

ter EUNICE P. STERNBERGER and the life of the survivor of them, and shall keep the same invested and perform the following acts and things:

*First: as to Income:* The Trustee shall collect the income therefrom and shall pay the net annual income as follows:

a) The Trustee shall pay to the Grantor's wife EUNICE E. STERNBERGER fifty per cent (50%) of such net income during the life of our daughter EUNICE P. STERNBERGER and in the event of the demise of our daughter EUNICE P. STERNBERGER thereafter such sums as hereinafter provided. Said income will be paid during said EUNICE E. STERNBERGER's life in monthly installments.

b) The Trustee shall pay to the Grantor's daughter EUNICE P. STERNBERGER the remaining fifty per cent (50%) of such net income in monthly installments during the life of the grantor's wife EUNICE E. STERNBERGER and in the event of the demise of the said Grantor's wife, shall pay to said EUNICE P. STERNBERGER the entire net income of the trust in monthly installments during her life.

[Tr. 31]

c) If the Grantor's daughter EUNICE P. STERNBERGER shall die before EUNICE E. STERNBERGER, then the Trustee shall pay the entire net income of the trust as follows:

1. Sixty percent (60%) thereof to EUNICE E. STERNBERGER during her life.

2. Forty percent (40%) thereof to EUNICE P. STERNBERGER's descendants in equal shares per stirpes as that class may from time to time be constituted, and at such time as no person in such class shall then survive then

was claimed on the estate tax return. The will disposes of decedent's residuary estate by providing that the same be held in trust during the joint lives of decedent's wife and his daughter and the life of the survivor of them. Upon the death of the survivor the principal is payable to the descendants then living of the daughter. In the event there are no descendants of the daughter the principal is payable one-half to certain collateral relatives of the decedent then living and one-half to certain charitable organizations. In the event none of the collateral relatives are then living the entire principal is payable to said charitable organizations. *Held*, the contingent remainders to charitable organizations can and have been valued by competent actuarial methods and the Commissioner erred in refusing to allow a deduction under section 812(d) of the Code for the value of these contingent remainders to charity.

[Tr. 16]

*William F. Wolff, Jr., Esq.*, and *Maurice C. Greenbaum, Esq.*, for the petitioner.

*Thomas R. Charshee, Esq.*, for the respondent.

The respondent has determined a deficiency in estate tax against the Estate of Louis Sternberger of $195,035.65. The deficiency is due to several adjustments made by the Commissioner to the estate tax return filed by the estate. Only one of these adjustments is contested. The contested adjustment is the disallowance by the Commissioner of $179,154.19, claimed as charitable bequests explained in respondent's deficiency notice as follows:

| *Charitable, etc., Gifts and Bequests:* | *Returned* | *Determined* |
|---|---|---|
| Items 2 to 5 inclusive | $179,154.19 | $0.00 |

Items 2, 3, 4 and 5 claimed as deductions under Schedule N, are disallowed in full since their actual present value cannot be determined by any known data.

The petitioner assigned error as to the foregoing adjustment. It also assigned as error the failure to allow deductions not claimed on the return. Petitioner's two assignments of error still pressed are as follows:

(a) The Commissioner has erroneously disallowed a deduction for Charitable, Public and Similar Gifts and Bequests in the amount of $179,154.19.

---

[Tr. 17]

FINDINGS OF FACT.

Some of the facts have been stipulated and are found accordingly and the stipulation of facts is incorporated herein by reference.

The petitioner is the executor of the last will and testament of Louis Sternberger, deceased. The decedent Louis Sternberger died June 25, 1947, a resident of Scarsdale, New York. The Federal estate tax return was filed on September 24, 1948, with the collector of internal revenue for the 14th district of New York disclosing a gross estate of $2,406,541.71, a net estate for purpose of the basic estate tax of $2,024,346.55 and a net taxable estate for purpose of additional estate tax of $2,064,346.55.

*Issue 1.*

The gross estate of the decedent for Federal estate tax purposes consisted of certain assets which he owned at the date of his death and certain other assets held in a revocable trust of which the decedent was the settlor

and primary life beneficiary. The revocable trust was created on January 20, 1931, and was amended from time to time by the decedent.

The last will and testament of the decedent is dated July 24, 1944, and the codicil thereto is dated October 20, 1945.

Paragraph FIRST of the codicil to decedent's last will and testament disposes of decedent's residuary estate by providing that the same be held in trust during the joint lives of decedent's wife, Eunice E. Sternberger, and decedent's daughter, Eunice P. Sternberger, and the life of the survivor of them. Upon the death of the survivor the principal is payable:

> to the descendants then living of said Eunice P. Sternberger in equal shares, *per stirpes*.

In the event there are no descendants of the decedent's daughter, Eunice P. Sternberger, surviving the decedent's widow and daughter, the principal is pay-

[Tr. 18]

able, one-half to certain collateral relatives of the decedent then living, and one-half to certain charitable organizations. In the event none of the collateral relatives are then living the entire principal is payable to said charitable organizations.

The dispositive provisions of the *inter vivos* trust, effective at the date of the decedent's death, are (after a specific bequest of $5,000) in all respects identical with the dispositive provisions of the residuary clause of decedent's last will and testament.

In the Federal estate tax return of the decedent a charitable deduction was claimed in the amount of $180,154.19, of which $1,000 represented an outright bequest to the Seamen's Church Institute of New York. The sum of $179,154.19 represented the alleged value

of the contingent charitable remainders provided for in decedent's last will and testament, and in the *inter vivos* trust of January 20, 1931.

The decedent's wife, Eunice E. Sternberger, survived the decedent and was sixty-two years of age at the date of decedent's death. She has always resided in the United States.

The decedent's daughter, Eunice P. Sternberger, survived the decedent and was twenty-seven years of age at the date of decedent's death. She had been previously married, which marriage terminated in divorce on March 31, 1944. At the date of decedent's death she was then unmarried and had had no children. Said daughter is a white female and has always resided in the United States.

The probability of a divorcee remarrying may be measured by established and accepted actuarial principles based upon known and reliable data.

The probability of a white female, age 27, having children may be measured by established and accepted actuarial principles based upon known and reliable data.

[Tr. 19]

The value of a remainder interest contingent upon a person dying without issue may be measured by established and accepted actuarial principles based upon known and reliable data.

The computation of the value of the charitable remainders provided for by decedent's last will and testament, and the *inter vivos* trust of January 20, 1931, was prepared by a recognized firm of actuaries in accordance with established actuarial principles based upon known and reliable data.

In making the computation of the present value of the charitable remainders it was assumed that if the decedent's daughter, Eunice P. Sternberger, married and

became the mother of a child, the child would survive her.

In making the computation of the present value of the charitable remainders it was assumed that there would be someone in the group of collateral relatives who would be living at the date of death of decedent's wife and daughter so that not more than 50 per cent of the principal of the residuary trusts would pass to the named charitable organizations.

The computation of the present value of the charitable remainders by petitioner's actuaries was based upon the following factors:

(a) Joint life expectancy of the decedent's wife and daughter, as determined by the Combined Experience Mortality Table prescribed in Section 81.10 of the Estate Tax Regulations promulgated by the Commissioner of Internal Revenue.

(b) The probability of the remarriage of decedent's daughter, Eunice P. Sternberger, as determined from the American Remarriage Table, published by the Casualty Actuary Society, Volume 19, pages 279-394—which table is accepted as valid for estate tax purposes by the United States Treasury Department.

(c) The probability of a child being born to decedent's daughter, Eunice P. Sternberger, as determined from a table prepared in accordance with accepted actuarial principles based upon known and reliable data derived from the Vital Statistics of the United States, 1940, published by the Bureau of the Census.

[Tr. 20]

The experience data from which the probability of issue being born to decedent's daughter Eunice P.

principal of the trust as the same shall then consist to the decendants then living of said EUNICE P. STERNBERGER in equal shares *per stirpes*, and if there be no such descendant living upon the death of the survivor of my said wife and daughter, then I direct my Trustee to continue to hold the corpus in trust and to pay over the net annual income thereof as follows:

a) One-quarter (1/4) thereof to NATIONAL JEWISH HOSPITAL AT DENVER.

b) One-quarter (1/4) thereof to FEDERATION FOR THE SUPPORT OF JEWISH PHILANTHROPIC SOCIETIES OF NEW YORK CITY.

c) One-sixth (1/6) thereof to THE PRESBYTERIAN HOSPITAL IN THE CITY OF NEW YORK.

d) One-sixth (1/6) thereof to SYDENHAM HOSPITAL, INC.

e) One-sixth (1/6) thereof to one or more organizations for the welfare and betterment of the Negro race selected by the Trustee.

Provided that if any of the foregoing organizations shall have ceased to exist, or if an organization named in (c), (d) or (e) shall cease to be nonsectarian (determined as provided below) in the conduct of its affairs, the Trustee shall pay over the share of income to which such organization would otherwise have been entitled to a generally similar nonsectarian charity selected by it. The Trustee for the purpose of determining nonsectarianism under this paragraph shall be entitled to rely upon an affidavit affirming the fact thereof made by an officer of the organization in question, unless affirmative evidence of sectarianism shall be brought to its attention, in which event it may request instructions of any court having jurisdiction.

Sternberger was computed, were compiled by the United States Bureau of the Census in connection with the 1940 Federal Census.

At the date of death of the decedent the present value of the charitable remainders provided in decedent's last will and testament and in the *inter vivos* trust of January 20, 1931, based on legitimate descendants only was $.24094 per dollar of trust corpus.

At the date of death of decedent the present value of the charitable remainders provided in decedent's last will and testament and in the *inter vivos* trust of January 20, 1931, based upon the same actuarial computations and data used in arriving at the values set forth above, except that the term "descendants" was deemed to include illegitimates, was $.24058 per dollar of trust corpus.

The present value of the charitable remainders at the date of death of decedent, assuming that the remarriage of decedent's daughter alone would defeat the charitable remainders, is $.18384 per dollar of trust corpus.

The computation of the present value of the charitable remainders on the assumption stated just above is based upon the same use of the Combined Experience Mortality Table and the American Remarriage Table, without referring to the probability of issue. This computation assumes that if decedent's daughter remarried, the probability of issue would be 100 per cent.

* * * * * * * * *

[Tr. 22]

OPINION

BLACK, *Judge:* There are two isues in this proceeding involving the estate tax. The major question concerns whether a contingent remainder to charity is deductible under section 812(d) of the Code and, if so, the amount of the deduction. * * *

*Issue 1.*

The applicable statute to Issue 1 is printed in the margin.[1] In the instant case there is no issue between the parties that the charities to which the contingent bequests were made are of the class named in section 812(d) of the Code. The only reason that respondent has denied the deduction which petitioner claims for these contingent charitable bequests is that he contends that the present value of decedent's contingent bequests to charity is too speculative and tenuous to be deductible. In support of this contention,

[Tr. 23]

respondent relies upon the Supreme Court's decisions in *Humes* v. *United States*, 276 U. S. 487, and *Robinette* v. *Helvering*, 318 U. S. 184.

Petitioner, on the other hand, contends that it has made clear and convincing proof that actuarial computations can and have been made of the present value of these contingent bequests to charity. Petitioner further

---

[1] INTERNAL REVENUE CODE.

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

(d) Transfers for Public, Charitable, and Religious Uses.—The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944), to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.

Q. Would you please state the precise problem that you worked upon in connection with this letter? A. The problem was to determine the value of the remainder to charity upon the second death of the two women, one age 27, the other age 62, provided that the younger

[Tr. 83]

woman die without issue. As of the date of our valuation she was unmarried but had previously been divorced. We therefore had four contingencies to consider, three aside from the interest rate: death, remarriage, and the probability of having issue; and we determined the basis for each of these four factors and proceeded with the computation.

The contingencies with respect to death and interest are described in the regulations. We did use the Combined Experience Table of Mortality and four percent interest. And with respect to the other contingencies —remarriage and the probability of issue—we made certain studies and computations to determine what we consider the most reliable and proper basis for a computation.

* * * * * * * * *

[Tr. 84]

Q. Mr. Silverman, in connection with the probability of remarriage, would you please state what tables you used in that connection? A. We used a table called the American Remarriage Table. That in our opinion was the best source and most reliable table for use in connection with this problem. The table had been prepared very recently. It was published in 1933. It was a result of a study made by a committee of the Casualty Actuarial Society. The study thoroughly covered the remarriage of widows under workmen's compensation cases, and the value was quite substantial. It was

Q. After making these computations did you arrive at a percentage figure representing the value of these contingent remainders with respect to one-half of the estate? A. Yes, sir.

Q. And what was the valuation that you determined under the circumstances you have set forth? A. For each one dollar of corpus represented in half the estate, that is for each dollar which charity might take the present value was 24.094 cents. That is about 24 per cent.

Q. Were you also requested to make a computation based purely on the first two contingencies, mortality and the probability of remarriage, without taking into account the probability of issue in this connection? A. Yes, I was. Although it was not exactly in that manner.

Q. Would you please explain what computations you were requested to make? A. We were asked to make such a computation, and we did it in a manner which assumed that every woman who married would have issue, provided she married before age 55, and that if she married after age 55 issue would not result, would not result, so that in effect it is contingent upon remar-

[Tr. 87]

riage alone provided the remarriage occurs prior to age 55.

Q. From an actuarial standpoint what is the probability of a woman having issue after age 54? A. According to the statistics published by the census it is zero. We have the data covering about 2,000,000 births in the year 1940 according to the age of mother, and there are none reported where the mother was over 54 years of age.

Q. I hand you this document. Would you please identify it? A. Yes. That is a letter which I sent to the firm of Greenbaum, Wolff & Ernst setting forth the

result of this second calculation which represented the present value of the contingent remainder assuming issue would result in the case of every marriage which occurred prior to the age of 55. The remainder value in that case per dollar of corpus was 18.384 cents.

Q. In connection with the Combined Experience Mortality Table adopted by the Commissioner of Internal Revenue, what is the hypothetical basis on which that table is established? A. Well, the table shows certain mortality rates which were derived from an old study, and these mortality rates were applied to a hypothetical group of 100,000 people, 100,000 children at age 10, and then it shows the progression of the death of survivors during their lifetime.

Q. According to that table what would be the num-

[Tr. 88]

ber of survivors, female, age 27 from this hypothetical group of 100,000 at age 10? A. The Combined Experience Table does not distinguish between sexes. Of the 100,000 persons living at age 10 there would be surviving 88,434 at age 27.

Q. Mr. Silverman, have you prepared a memorandum explaining the basis for your computations and showing the tables and statistics which you used in making your computations you have just referred to? A. Yes, sir.

Q. In your memorandum have you taken as your starting point 88,434 unmarried women at age 27 as determined under the Combined Experience Mortality Table? A. Yes, sir.

Q. Would you please explain to the Court how you derived your final figure from that starting point as set forth in your memorandum? A. Well, the problem basically was to make use of the Combined Experience Table and not to depart from it so far as mortality is

concerned and, in effect, to break up the number of people surviving into three parts, being careful to reserve the total.

The tables which I prepared personally showed a progress of unmarried women starting with this figure of 88,434 at age 27, the progress of those unmarried,

[Tr. 89]

those married childless, and those married who had become mothers; so that the sum of the three parts equalled the total as represented by the Combined Experience Mortality Table.

Q. Will you please explain then how you interjected the probability of issue into these computations? A. The probability of issue which was derived from these tables was applied to the number of married women. It represents a percentage of a proportion that will become mothers during each year of life, and by applying that probability of issue to the number of married women exposed we did derive the number that would become mothers. As I said, we traced that group through their lifetime.

MR. GREENBAUM: At this time I would like to offer in evidence as Petitioner's Exhibit No. 3, the letter of September 20, 1948, from the witness to the firm of Greenbaum, Wolff & Ernst.

THE COURT: That is the one, I understand, on which he made the computation on which you rely in this case.

MR. GREENBAUM: That is correct.

MR. CHARSHEE: No objection. May I have a copy?

MR. GREENBAUM: Yes, you may have a copy of that. Together with the three tables attached to the letter.

THE COURT: All right. Received as Petitioner's Exhibit No. 3.

(Petitioner's Exhibit No. 3. was received in evidence.)

[Tr. 30]

**Exhibit 1 Attached to Stipulation**

Two Oak Lane
Scarsdale, New York
October 20, 1945

The Chase National Bank of the City of New York
as Trustee under Trust Indenture dated
January 20, 1931, as amended, made by
Louis Sternberger
Eleven Broad Street
New York 15, New York

Gentlemen:

In accordance with the right reserved to the Grantor to revoke, modify or amend the above Trust Indenture, I, the Grantor, do hereby exercise such power as follows:

1. I do hereby revoke in its entirety paragraph "FIRST" of the said Trust Indenture as heretofore amended, and, in lieu thereof, I hereby substitute the following:

"FIRST: The Trustee shall hold the Trust Estate during the life of the Grantor, in trust, to collect the income therefrom and to pay the same to him in monthly payments during his life.

"Upon his death, the Trustee shall transfer and pay over the sum of Five Thousand Dollars ($5,000), free of estate and inheritance taxes or other charges to VINCENT L. BANKER, if he survives the Grantor, as a token of the Grantor's friendship and appreciation of the interest the said VINCENT L. BANKER has taken in the Grantor's affairs during his lifetime, and shall continue to hold the balance of the Trust Estate in trust during the period of the joint lives of the Grantor's wife EUNICE E. STERNBERGER and the Grantor's daugh-

to pay said income to my niece BLANCHE R. WOLFF and my grandnephews WILLIAM F. WOLFF, JR. and JAMES A. WOLFF or such of them as may be surviving for the time being in equal shares except that if either WILLIAM F. WOLFF, JR. or JAMES A. WOLFF shall die his descendants as the class may from time to time be constituted shall receive the income said WILLIAM F. WOLFF, JR. or JAMES A. WOLFF would have been entitled to, if living, in equal shares per stirpes. At such time as there be none of said persons surviving, the trustee shall pay such income to the charities entitled to receive income under the following paragraph numbered "Second"

SECOND: *as to Principal:* Upon the death of the survivor of EUNICE E. STERNBERGER, EUNICE P. STERNBERGER and the Grantor, the Trustee shall transfer, assign and set over the net principal of the Trust as the same shall then consist to the descendants then living of said EUNICE P. STERNBERGER in equal shares *per stirpes,* and if there be no such descendants living upon the death of the survivor of the Grantor, his said wife and daughter, then the Trustee shall transfer, assign and set over one half (½) the net principal of the trust to BLANCHE R. WOLFF, WILLIAM F. WOLFF, JR., and JAMES A. WOLFF or such of them as may be then surviving in equal shares except that if either JAMES A. WOLFF or WILLIAM F. WOLFF, JR. is then deceased his descendants shall receive the share said JAMES A. WOLFF or WILLIAM F. WOLFF, JR. would have been entitled to, if living, in equal shares per stirpes; and said Trustee shall continue to hold the other one half (½) of the net principal of trust or the whole of said principal if none of the person's above mentioned shall then survive, in trust and shall pay over the net annual income thereof in perpetuity as follows:

a) One-quarter (¼) thereof to NATIONAL JEWISH HOSPITAL AT DENVER.

b) One-quarter (¼) thereof to FEDERATION FOR THE SUPPORT OF JEWISH PHILANTHROPIC SOCIETIES OF NEW YORK CITY.

c) One-quarter (¼) thereof to THE PRESBYTERIAN HOSPITAL IN THE CITY OF NEW YORK.

d) One-quarter (¼) thereof to one or more organizations for the welfare and betterment of the Negro race selected by the Trustee;

provided that if any of the foregoing organizations shall have ceased to exist, or if an organization named in (c) or (d) shall cease to be nonsectarian (determined as provided below) in the conduct of its affairs, the

[Tr. 32]

Trustee, shall pay over the share of income to which such organization would otherwise have been entitled to a generally similar nonsectarian charity selected by it. The Trustee for the purpose of determining nonsectarianism under this paragraph shall be entitled to rely upon an affidavit affirming the fact thereof made by an officer of the organization in question, unless affirmative evidence of sectarianism shall be brought to its attention, in which event it may request instructions of any court having jurisdiction."

2. In all other respects I do hereby confirm the said Trust Indenture of January 20, 1931, and the amendments thereto heretofore made and not heretofore or herein revoked or modified.

3. The right is fully reserved to the Grantor further to revoke, modify or amend the Trust Indenture of January 20, 1931, at any time by filing a written instrument with the Trustee.

Will you kindly acknowledge the receipt and acceptance of this amendment by signing and returning the enclosed carbon copy of this letter.

Very truly yours,

LOUIS STERNBERGER
Louis Sternberger

WITNESS:
LOUIS KARSCH

ACCEPTED: October 20, 1945
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee
By [Signature illegible]
*2nd Vice President*

[The following documents, which, together with the foregoing letter, constitute the taxpayer's Exhibit 1, are not printed here, namely, (1) the trust indenture dated January 20, 1931, referred to in said letter, and (2) various and sundry other letters of Louis Sternberger antedating said letter, which gave instructions to the bank regarding said trust indenture.]

---

[Tr. 63]

**[Exhibit 2 Attached to Stipulation]**

I, LOUIS STERNBERGER, residing at Scarsdale, New York, do hereby make, publish and declare the following as and for my Last Will and Testament:

* * * * * * * * *

[Tr. 65]

SEVENTH: I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatever kind and nature and wherever situated, of which I shall die seized or possessed or over which I shall have any power of disposition or appoint-

Q. You know of no recognized table in the United States dealing with that subject? A. Not one that would be appropriate for this problem.

Q. Do you know of any legal proceeding in which the table as you prepared has ever been used? A. Well, by legal proceeding, are you thinking of tax cases or—

Q. I am thinking of any case. Of course your answer automaticaly would be no because you just made the statement it was the first table which you ever prepared and you also made the statement you did not know of any other table. So— A. I do not know.

Q. Therefore, you do not know of any legal proceeding in which such a table was used? A. I don't know of any other table that would have any recognition. But the insurance companies probably many times have made certain supplementary studies for their own use. It is likely that the large insurance compaines, every one of them, may have considered this problem.

[Tr. 96]

* * * * * * * * *

MR. CHARSHEE: That is all.

Redirect Examination

By Mr. Greenbaum:

Q. Mr. Silverman, if you were given an experience record dealing with the number of deaths within a given life group and if you were given all of the other data that are customarily used in establishing a mortality table, from that data even though you did not have an earlier existing table, could you then determine the life expectancy of a person at a given age? A. Yes, sir. I have done it many times.

Q. If you were then given an experience record, a universal experience record with respect to the United States dealing with the number of deaths, dealing with

ment, or in which I shall have any interest, to my Trustee to hold the same in trust during the period of the joint lives of my wife EUNICE E. STERNBERGER and our daughter EUNICE P. STERNBERGER and the life of the survivor of them, to keep the same invested and to do

[Tr. 66]

and perform the following acts and things:

*First: as to Income:* To collect the income therefrom and after paying all proper charges to pay the net annual income as follows:

a) To pay to my wife EUNICE E. STERNBERGER fifty per cent (50%) of such net income during her life, in monthly installments;

b) To pay to our daughter EUNICE P. STERNBERGER the remaining fifty per cent (50%) of such net income in monthly installments during the life of my wife EUNICE E. STERNBERGER, and after the death of my said wife to pay to our daughter EUNICE P. STERNBERGER the entire net income of the trust in monthly installments so long as she shall survive, or if our daughter EUNICE P. STERNBERGER shall die before EUNICE E. STERNBERGER, then to pay all of the income to which my daughter would have been entitled hereunder, if living, to her descendants in equal shares *per stirpes* as that class may from time to time be constituted, or, if no person in such class shall then survive, to pay over such income to the charities entitled to receive income under the following paragraph.

*Second: as to Principal:* Upon the death of the survivor of EUNICE E. STERNBERGER and EUNICE P. STERNBERGER, to transfer, assign and set over the net

[Tr. 67]

IN WITNESS WHEREOF, I have signed and sealed this will this 24th day of July, 1944.

LOUIS STERNBERGER

[Duly witnessed]

---

[Tr. 71]

**Official Report of Proceedings Before the Tax Court of the United States**

---

[Caption]

Hearing at New York, N. Y.
Date: November 15, 1951.

* * * * * * * * *

[Tr. 80]

THE COURT: The stipulation of facts and the exhibits attached thereto are received in evidence.

* * * * * * * * *

Whereupon,

**David Silverman**

[called on behalf of the taxpayer] testified as follows:

[Tr. 81]

Direct Examination

By Mr. Greenbaum:

Q. Please state your name and occupation. A. David Silverman. I am a consulting actuary.

Q. Would you please state your place of business and the firm with which you are affiliated? A. I am a member of the firm of Wolfe, Corcoran & Linder, at 116 John Street, New York.

Q. Would you please state your educational and professional background for the Court, please, Mr. Silverman? A. I am a graduate of McGill University in Canada. I took the business and actuarial courses there. I entered into actuarial work in 1927.

I was admitted to fellowship in the Casualty Actuarial Society in 1931. Practiced as a consulting actuary ever since 1927. My present association with Wolfe, Corcoran & Linder commenced in 1934 as an associate actuary, and I was admitted to membership in the firm in 1945.

Q. In your professional experience, Mr. Silverman, have you ever been called upon by any private or governmental agencies to prepare actuarial tables in connection with various types of probabilities dealing with vital statistics? A. Yes, we have. The firm has and I have personally.

Q. Were you asked to prepare an actuarial compu-

[Tr. 82]

tation dealing with the following three contingencies: mortality, probability of remarriage, and probability of issue, by the firm of Greenbaum, Wolff & Ernst? A. Yes, sir.

* * * * * * * * *

Q. Were you asked to render your opinion whether a computation dealing with those contingencies was feasible from the standpoint of established and recognized actuarial principles? A. Yes, sir.

Q. I hand you this paper. Would you please identify it? A. This is a letter I wrote to the firm of Greenbaum, Wolff & Ernst in September, 1948. It sets forth briefly the problem presented in this case, the method by which we made these particular computations, and the result of the computations in terms of the contingent value of the charitable remainder.

an extensive study and considered quite reliable by the Casualty Actuarial Society.

Q. Were these computations referred to in this let-

[Tr. 85]

ter prepared under your personal supervison? A. Yes, they were.

Q. In connection with the third contingency you spoke of, the probability of issue, would you please explain the basic data that was used in that connection? A. The basic data was the statistics published by the Bureau of the Census of the Population Division by the Government. The statistics taken in the study all related to the 1940 census. That is, we had tables by race, sex, and age, and similar data with respect to that, and also reported the number of births in the United States by order of birth and certain supplemental data; and using such statistics as a base I compiled a table showing the probability of a married woman becoming a mother.

Q. The basic experience record from which you derived your table that you used in this connection was from what primary source? A. From the published reports of the Bureau of the Census. There are several volumes of books and we searched for those which would give this information.

Q. The tables published by the Bureau of the Census with respect to the 1940 census, do they contain data with respect to all women in the United States? A. Yes.

Q. So that your experience record from which you derived your probability of issue in this instance was

[Tr. 86]

based upon the experience record of all women in the United States in the year 1940? A. That is correct.

[Tr. 90]

MR. GREENBAUM: Petitioner offers in evidence the letter of January 27, 1950, from the petitioner to Greenbaum, Wolff & Ernst, as Petitioner's Exhibit 4.

MR. CHARSHEE: What is this?

MR. GREENBAUM: This is the second letter, which you also have.

THE COURT: That makes a different computation, as I understand.

MR. GREENBAUM: This letter makes a computation solely on the probability of remarriage, assuming that if the daughter would remarry before age 55 she would have issue.

THE COURT: So I understood.

MR. GREENBAUM: Together with the table attached.

THE COURT: Received as Petitioner's Exhibit 4.

(Petitioner's Exhibit No. 4 was received in evidence.)

MR. GREENBAUM: Petitoner offers in evidence the memorandum of November 13, 1951, prepared by David Silverman in explanation of the actuarial tables used in computations for the Estate of Louis Sternberger.

MR. CHARSHEE: No objection.

THE COURT: Be received as Petitioner's Exhibit 5.

(Petitioner's Exhibit No. 5 was received in evidence.)

By Mr. Greenbaum:

[Tr. 91]

Q. Mr. Silverman, were you also requested to make a computation adjusting your original valuation, taking into account that the daughter at age 27 would have or might have illegitimate issue as well as lawful issue? A. Yes.

Q. I hand you this paper. Would you please identify it? A. This is a letter written by me to the firm of Greenbaum, Wolff & Ernst, at a later date which discusses the effect of illegitimate issue on this problem. The fact that in our first computation it had not been completed covered or taken care of and setting forth the adjusted result after making an adjustment for illegitimate issue to the extent that it had not been previously considered.

Q. In your original computation had there been any provision in your computations that related to illegitimate issue? A. Well, not specificaly. I did not consider the problem at all originaly. But by using the Census Reports showing the number of children born, that would automatically include illegitimate children. There were no distinctions made as to the number of children born in the United States, so that they were used in deriving the probability that a woman would become a mother, and it automatically was reflected in our first computation as being in the rate.

Q. After making the adjustment in the computation

[Tr. 92]

referred to in your letter of November 1, 1949, what was the valuation that you then determined? A. For each dollar of corpus which might go to charity, 24.058 cents.

MR. GREENBAUM: The petitioner offers in evidence the letter from the witness to Greenbaum, Wolff & Ernst dated November 1, 1949, as Petitioner's Exhibit 6.

MR. CHARSHEE: No objection.

THE COURT: It will be received as Petitioner's Exhibit No. 6.

(Petitioner's Exhibit No. 6 was received in evidence.)

By Mr. Greenbaum:

Q. Mr. Silverman, when you originally started to make the computations that were requested of you, did you know of any tables dealing with the probability of issue in the United States? A. No. None that would have been appropriate for this purpose.

Q. Do you know, were there any tables dealing with the probability of remarriage with respect to the United States experience? A. Yes. Yes, there was.

Q. That was the American Remarriage Table that

[Tr. 93]

you used as a basis for your computations? A. Yes, sir.

Q. Are there any other remarriage tables with respect to the United States experience, to the best of your own knowledge? A. Not that I know.

MR. GREENBAUM: No further questions.

THE COURT: Would you like to recess for 10 or 15 minutes to read the documents?

MR. CHARSHEE: No, your Honor, I would not. If your Honor would like to recess—

THE COURT: No. I usually recess along about eleven o'clock, we will say.

MR. CHARSHEE: Very well. I will be through in a few minutes.

Cross-Examination

By Mr. Charshee:

Q. I just wanted to explore the question of whether or not a woman of 27 will ever have a child.

It is my understanding, or you just made the statement that there does not exist any table covering that point. A. That is right.

Q. You prepared the table as I understand it from data obtained from the Census Bureau? A. Obtained from the published reports of the Census Bureau.

[Tr. 94]

Q. What was the nature of that Census Bureau data? A. There were several tables, but it was in effect the statistics with reference to the United States in 1940. The data represented factual data, so many people.

Q. On what? On what? A. I don't understand.

Q. Factual data on what? A. With respect to the number of people living, dying, the number of births in the country, and various studies as to—

Q. As I understand it, this table just merely states the number of births in the United States during a certain period of time? A. It is more extensive than that. For example, there might be one table showing the number of women in the country by age, whether married or unmarried, a second table showing the number of married women by race, age.

Q. What was the table with respect to women having babies after 27 years of age? A. There was no such table in that form, but there were statistics showing the number of married women in the country by age and other tables showing those which had families and those which were childless.

Q. I see. A. And still further tables showing the

[Tr. 95]

number of children born in the United States and whether they were first births or showing the order of births.

Q. As I understand it, this is the first table that you have ever prepared of this character? A. That is correct, with respect—

the number of births, dealing with the number of births to married women throughout the United States, even though there was no existing table that gave you a

[Tr. 97]

mathematical figure, from that table could any actuary after sufficient study and work determine the probability of a woman of a given age having lawful issue? A. Yes, sir, could.

Q. Is there any basic difference actuarially between the first computation which I spoke of and the second computation? That is between a mortality and a natality table, if you please? A. Basically, no. That is the methods and techniques are the same.

Q. Do you know of any proceeding in which a remarriage table has been used? A. Yes, sir, I do.

Q. In what connection was that? A. In the Maresi case, which I do not know all the details, but I do know the probability of remarriage was recognized by the courts and the American Experience Table had been used as the basis.

Q. You were familiar with what table of remarriage was used in that case, and what table was that? A. The American Remarriage Table.

Q. Is that the same table you used in your computations? A. It is.

Q. In your basic computations you relied upon (1) the mortality table adopted by the Commissioner of In-

[Tr. 98]

ternal Revenue in his estate tax regulations and, secondly, the American Remarriage Table which was adopted by the Court in the Maresi case? A. Yes, sir.

Q. The third table and the third contingency which you then added in was derived from a table which you yourself prepared but based on the records and the pub-

lished tables from the United States Bureau of the Census? A. Yes, sir.

MR. GREENBAUM: No further questions.

* * * * * * * * *

MR. CHARSHEE: Yes, that is all.

THE COURT: Let me ask a question and see if I understand it.

The first computations that you have made would be based on the American Mortality Table, and you would reach a figure that would be the valuation if there were nothing else to reduce it. But after you had arrived at that figure, then you do reduce it by these other second and third contingencies, do you? You subtract from that valuation the subtraction that would have to be made on account of the second and third contin-

[Tr. 99]

gencies, is that the way you arrived at it?

THE WITNESS: Well, that is the effect. That is not the exact method or the technique. The method is to prepare entirely new tables where the number of survivors and deaths are broken into the various groups.

THE COURT: In other words, if you did not have the contingencies there would not be any difficulty in figuring the valuation, I suppose, based on the probability of her death. If you did not have to use the contingencies you would not have any computations?

THE WITNESS: Yes. But in effect, rather than getting a result based on mortality alone and then making a subtraction, it was necessary to recast the combined experience mortality table in the three subdivisions according to marital status.

THE COURT: All these have been explained or covered in these letters and statements that have been introduced?

MR. GREENBAUM: May I just say that the memorandum that was prepared by Mr. Silverman was an attempt to explain the basic calculations in perhaps simpler language than in the original letters.

THE COURT: You are through with Mr. Silverman?

MR. GREENBAUM: No further questions.

THE COURT: All right, sir.

(Witness excused.)

[Tr. 102]

* * * * * * * * *

Whereupon,

**Richard Fondiller,**

[called on behalf of the taxpayer] testified as follows:

Direct Examination

By Mr. Greenbaum:

[Tr. 103]

Q. Please state your name. A. Richard Fondiller.

Q. What is your occupation, Mr. Fondiller? A. Consulting actuary.

Q. Would you please state your educational and professional background, Mr. Fondiller? A. Graduated from the College of the City of New York with a bachelor degree; graduated from the Columbia University Law School with law degree; received a degree of Master of Arts from Columbia University.

Admitted to the Bar many years ago. And then in respect to experience and qualifications, I am a Fellow of the Society of Actuaries for many years; Fellow of the Academy Actuarial Society, Fellow of the Institute of—American Institute of Insurance, et cetera.

I have been connected in actuarial and executive capacities with various insurance companies, and I have been a consulting actuary for the last 29 years.

Q. In connection with your professional experience, Mr. Fondiller, have you ever acted in an actuarial capacity on behalf of any of the insurance departments of any states in the United States? A. Yes. Over long experience, computed tables of pensions for widows and children for the State of New York, calculated premium rates for the State of Ohio, represented the

[Tr. 104]

State of Michigan in certain litgation involving insurance companies, done work for the State of Colorado in actuarial capacities, and made premium rates of various kinds for hospitalization, accident, health, life insurance, for numerous life insurance companies, casualty insurance companies, and so forth.

Q. Have you heard the testimony of Mr. David Silverman in this case? A. Yes.

Q. Have you personally prepared any tables of a comparable nature to those described by Mr. Silverman? A. Way back in 1914, '15, while I was the Assistant Actuary of the New York Workmen's Compensation Commission we—under my personal supervision and under the general supervision of the actuary—tables involving mortality and remarriage were calculated for the use of the Workmen's Compensation Commission while I was in their employ.

Q. Mr. Fondiller, were you asked to examine the work sheets and actuarial computations prepared by Mr. David Silverman to which we have already referred? Were you asked those computations and to check upon their actuarial validity? A. Yes.

Q. And you have made such an examination? A. I have made such an examination under general supervision of our staff. I have had the figures referred to

[Tr. 105]

me for review.

Q. In your professional opinion, Mr. Fondiller, are the calculations and the results obtained by Mr. Silverman in accordance with known established, recognized actuarial principles? A. Yes, they are.

Q. Mr. Fondiller, if you had been asked to make the same computations, would your methodology, your actuarial technique, have been any different than those employed by Mr. Silverman in making his computations? A. No.

Q. In your opinion, Mr. Fondiller, would any recognized and reputable actuary called upon to make the same computations have used any different techniques and methodology than that employed by Mr. Silverman? A. No, sir.

Q. I hand you this paper. Would you please identify it? A. This is a certificate from me dated November 14, 1951 certifying to the fact that the calculations of Wolfe, Corcoran and Linder in their letter of September 20, 1948, and their letter of January 27, 1950, were done in accordance with actuarial procedures.

MR. CHARNEE: No objection.

MR. GREENBAUM: Petitioner offers the letter certificate of Mr. Richard Fondiller dated November 14, 1951,

[Tr. 106]

in evidence as Petitioner's Exhibit No. 7.

THE COURT: Be received in evidence as Petitioner's Exhibit No. 7.

(Petitioner's Exhibit No. 7 was received in evidence.)

By Mr. Greenbaum:

Q. Are you familiar with the American Remarriage Table? A. Yes.

Q. Are you familiar with the fact that that table was used as a basis for computation in the Estate of Maresi,

a case tried in the Tax Court of the United States? A. I am familiar with that.

Q. In your opinion, Mr. Fondiller, is the table used by Mr. Silverman with respect to the probability of issue of a white female, age 27, more reliable or less reliable than the computations of the results obtained in the American Remarriage Table? A. Why, they are more reliable for the reason that in actuarial science what we deal with is the number of years of exposure to death, accident, to remarriage, birth. The number of years of exposure in the American Remarriage Table are somewhat less than 100,000 years; on the other hand, in Mr. Silverman's calculation dealing with white, unmarried females in the entire United States there are quite a few million years of exposure.

[Tr. 107]

Q. In your opinion, is the method of securing data relied upon by the Bureau of the Census a reliable method of securing basic actuarial data? A. I would regard it as being sound for the reason that there are so many millions of lives involved and the probability of errors either one way or the other way are neutralized over such a very large exposure of lives.

Q. In connection with the American Remarriage Table, could you state the basic experience record from which that table was derived? A. In these United States there are men killed in industry who leave widows. These widows are entitled to life pensions as long as they remain unmarried. As soon as they remarry their pensions cease. And a committee of the Casualty Actuarial Society made an investigation as to what happened to these widows, namely did they remarry or did they not, and secured the experience from all the insurance companies and from the various workmen's compensation boards in the United States, and

developed therefrom a table showing the rate of remarriage, just as we have in life insurance the table of mortality.

Q. Was the American Remarriage Table originally published in the proceedings of the Casualty Actuarial Society? A. Yes.

Q. Are you officially affiliated with the Casualty Ac-

[Tr. 108]

tuarial Society? A. Yes. I have been the secretary of the Society and still am, and have been secretary of the Society for 33 years.

Q. Are you familiar with the manner in which papers published in the annual proceedings are determined? A. Yes.

Q. In connection with the American Remarriage Table published in those proceedings, did the Casualty Actuarial Society make any reservation or any comments with respect to the validity of the table of which we are speaking. A. No, sir, they did not.

* * * * * * * * *

Q. In your opinion, Mr. Fondiller, would the Casualty Actuarial Society publish a table prepared in the manner in which Mr. Silverman has prepared an isolated table solely with respect to the age 27 but if that were expanded to all ages would the Casualty Actuarial

[Tr. 109]

Society publish such a table? A. Yes.

Q. In your opinion, would the Casualty Actuarial Society have any reservation with respect to the validity of such a table if it were published? A. If the table were calculated on the basis comparable to that of the American Remarriage Table or any mortality table with sufficient data, the table would be published and included in the proceedings of the Society.

Q. Are you familiar with the discussion in the Maresi case dealing with prior remarriage tables other than the American Remarriage Table that was used in that case? A. Yes.

Q. What was the exposure or the experience record used as the basis of these other remarriage tables?

* * * * * * * * *

A. Well, there were other remarriage tables that had been employed before the American Remarriage Table. For example, the Dutch Remarriage Table had been used for many years in the United States for the reason that there had been no American experience com-

[Tr. 110]

piled. Now, that the American Remarriage Table has been compiled, that is the standard in the United States. In other words, for lack of any United States experience we used the experience of the Dutch Royal Insurance Institute of Holland.

Q. In your opinion, would a table based upon the experience record of 1500 members, male members of the Scotch peerage be an adequate basis for a remarriage table or a table, or a table dealing with probability of issue? A. Not in my opinion.

Q. Are you familiar with the general literature in the actuarial field? A. Yes.

Q. Do you know of your own personal knowledge whether there are any tables dealing with remarriage and the probability of issue in any countries outside the United States? A. Yes.

Q. Would you please tell us about these other tables outside the United States?

MR. CHARSHEE: I think the tables themselves are the best evidence.

THE WITNESS: I have them here, counsel. I have personal knowledge of this because it is published in the

proceedings of the Casualty Actuarial Society, which is the Society of which I have been secretary for many years. And the background is this official table of the

[Tr. 111]

Minister of Labor of France. These are the original tables and the text is printed in French, entitled "Document No. 10 of the Minister of Labor, Tables de Nuptialite et Natalite," tables of marriage and birth. And on the title page it states that the Minister of Labor had to issue these official tables for the reason that a law had been passed in 1921 providing for insurance companies insuring these two forms of insurance.

Then in 1932 a paper was presented to the Casualty Actuarial Society and accepted and printed in the proceedings of the Society, volume 18, from pages 405 to 440. This paper is entitled "Marriage and Birth Insurance in France" by Henry Balu, member of the French Institute of Actuaries and the actuary for Europe of the Equitable Life Assurance Society of the United States.

And in this paper he describes the fact that there are three insurance companies writing this form of insurance. And he gives various mathematical formula and tables, and he also has in there on page 437 a table entitled "table of reproductive rates." In other words, it is a birth rate just like we were talking of the rate of mortality, this is the rate of birth at certain ages based upon the French census.

Q. Mr. Fondiller, are you familiar with the actuarial methods and the actuarial techniques that were employed as the basis for this French table to which you have been referring? A. Yes.

[Tr. 112]

* * * * * * * * *

Q. From the standpoint of the basic exposure or the experience from which these two tables have been derived, the French table and Mr. Silverman's single table, in your opinion, which is the more reliable? A. Well, I would regard the French table as being reliable because it does cover the exposure of many million females. On the other hand, we have to remember that the United States population of unmarried females, the exposure is more than double that of the French table. So that we can certainly say any calculations based upon American experience are really dependable.

[Tr. 113]

* * * * * * * * *

Q. I hand you this document. Would you please identify it? A. This is report No. 10 of the Minister of Labor of France.

Q. Referring to page— A. 25.

Q. —25 of that document, would you please tell us what the probability of a woman, age 27, having issue in accordance with that table—

MR. CHARSHEE: I thought that was in French. Is he interpreting this?

THE WITNESS: The figures are in English.

[Tr. 114]

* * * * * * * * *

MR. GREENBAUM: If your Honor please, I would like to call attention to one particular single item in this entire table, rather than—

THE COURT: He may. He may.

THE WITNESS: The figure for age 27 females is .2088 which means that in a single year out of 1,000 females, married females, there will be 208 births out of each 1,000.

MR. GREENBAUM: The petitioner offers the French tables in evidence as Petitioner's Exhibit No. 8.

MR. CARSHEE: I have no objection.

THE COURT: Be received as Petitioner's Exhibit No. 8.

(Petitioner's Exhibit No. 8 was received in evidence.)

* * * * * * * * *

THE COURT: Is it necessary to put all the tables in or just some specific table?

MR. GREENBAUM: I would just introduce page 25, if

[Tr. 115]

that is satisfactory to the Court and to counsel.

THE WITNESS: And the title page.

MR. CHARSHEE: That is satisfactory. And showing the year.

THE COURT: Yes. And page 25.

MR. GREENBAUM: The title page has the year.

By Mr. Greenbaum:

Q. Mr. Fondiller, if an insurance company in the United States were to write insurance similar to that in vogue in France, and if such a company were to come to you to prepare a table to be used as the basis for their business, would you use the same method employed by the French table and Mr. Silverman's table in establishing such a table?

* * * * * * * * *

THE WITNESS: Yes.

THE COURT: You mean you would use the same method?

THE WITNESS: I would.

[Tr. 116]

* * * * * * * * *

By Mr. Greenbaum:

Q. Are you familiar with the tables that are prepared for use by insurance companies with respect to life insurance? A. Yes, I am.

Q. Are you also familiar with the tables used by insurance companies with respect to what is commonly known as double indemnity policies or policies in which payment of insurance proceeds is made for death by accident? A. Yes.

Q. In your opinion, from an actuarial standpoint is there any difference between the valuation used for life insurance or the valuation used for accident insurance? A. Well, in a life insurance policy which is payable at death, there we figure the rate of mortality each year, as we all know every person must die, so that the

[Tr. 117]

amount of insurance involved must be paid at death. However, when it comes to double indemnity, tables have been developed showing the probability of death by accident at all ages. Some will die by accident and some will not. And it is this probability that is calculated to be the basis for calculating a premium rate to pay in the event of death by accident.

MR. GREENBAUM: No further questions by the petitioner.

Cross-Examination

By Mr. Charshee:

Q. Did you hear my questions that I asked Mr. Silverman on cross-examination, and did you also hear his answers? A. Yes, sir.

Q. Would your answers be the same? A. Yes, sir.

Q. I just want to ask you a couple of questions now about this French table that you say was prepared there. What year was that prepared? A. The French

law was passed in 1921 and the table was prepared—the regulations were issued in the year 1921.

Q. What method was used by the French authorities in compiling that table? A. They used the census returns for the years 1901, 1905—1901, 1906, and 1911, because a census is taken in France every five years.

[Tr. 118]

Q. Do I understand, then, that they used the same method in arriving at the table covering the contingency of having a child as Mr. Silverman did? A. Yes, sir.

Q. What were those French tables used for—for what purpose? A. They were used in order to—for the Minister of Labor to issue regulations to insurance companies, because when insurance companies wanted to write this form of insurance the French Government wanted to know that it, the companies, would remain solvent and that they would charge adequate premium rates for birth insurance and marriage insurance, and hence these regulations.

MR. CHARSHEE: That is all.

MR. GREENBAUM: One question.

Redirect Examination

By Mr. Greenbaum:

Q. The tables you have been referring to, when were they printed in the proceedings of the Casualty Actuarial Society? A. They were printed on May 20, 1932.

MR. GREENBAUM: No further questions.

* * * * * * * * *

[Tr. 119]

* * * * * * * * *

MR. CHARSHEE: No further questions.

THE COURT: Is that all, Mr. Greenbaum?

MR. GREENBAUM: Yes, your Honor, that is all for this witness.

(Witness excused.)

---

[Tr. 124]

**Taxpayer's Exhibit 3**

September 20, 1948

Greenbaum, Wolff & Ernst
285 Madison Avenue
New York 17, N. Y.

Gentlemen:

Re: Estate of Louis Sternberger, Deceased
Date of Death, June 25, 1947
Westchester County, New York

At your request, we have determined the present value of the charitable remainder under the will of the above deceased at date of death. The data on which we have based our calculations is as follows:

| | | |
|---|---|---|
| 1. Total Gross Value of Estate | | $2,406,541.71 |
| Less: Various Expenses | $102,040.97 | |
| Charitable Bequest to Seamans Church Institute | 1,000.00 | |
| Bequests to Marion and Robert Gans | 2,000.00 | |
| Bequest to Wife (Personal Effects) | 1,727.00 | 106,767.97 |
| Net Balance on which to base Charitable Remainder | | $2,299,773.74 |

2. Under the terms of the will, Eunice E. Sternberger, widow, and Eunice P. Sternberger, daughter, have a joint survivorship life interest in the income of the estate and upon the death of the survivors, the corpus is to be paid to the then living descendants of

Eunice P. Sternberger and if there be no such descendants, one-half of the net income of the trust is to be paid in perpetuity to certain charitable institutions.

3. Eunice E. Sternberger, widow, was born on May 20, 1885 and at the date of testator's death, June 25, 1947, was 62 years old.

4. Eunice P. Sternberger, daughter, was born on March 2, 1920 and at the date of testator's death, June 25, 1947, was 27 years old.

5. Eunice P. Sternberger, daughter, was married January 16, 1942 and divorced March 31, 1944, at which time she was 24 years old. At the date of testator's death and at the present time she has not remarried and

[Tr. 125]

has had no issue.

6. The mortality table used in determining the charitable remainder was the Combined Experience Table of Mortality.

7. The remarriage table used in determining the charitable remainder was the American Remarriage Table as set forth in the proceedings of the Casualty Actuarial Society, Volume XIX, page 332.

8. With respect to the probability of issue, we found no maternity rates in publications which were appropriate for use in these calculations. We, therefore, derived maternity rates from the data contained in the reports of the Bureau of the Census which reflect the probability that a childless white married female will become a mother. The basic data used in the compilation of such rates was taken from the reports of the Bureau of the Census showing the number of white females in 1940 according to the age and the number of births during 1940 according to the age of the

mother. From this data we derived maternity rates according to the age of the mother in such manner that only the first birth was considered, that is, our maternity rates represent the probability that a married female will become a mother by the birth of her first child. It is worthy of note that our calculations gave no consideration to the probability of death of the issue, that is, it has been assumed that if Eunice P. Sternberger married and became the mother of a child, the child would survive her; also in our calculations no consideration was given to the possibility of Blanche R. Wolff, niece, William F. Wolff, Jr. and James A. Wolff, grand nephews of the deceased, predeceasing the widow and daughter and William F. Wolff, Jr. and James A. Wolff leaving no issue, in which event all of the corpus instead of one-half therof would revert to charity. These facts result in the computation understating the value of the remainder to charity.

9. In all of the calculations we have assumed an interest rate of 4%.

In accordance with the foregoing, we have determined that the value of the charitable remainder is $.24094 per $1 represented in the one-half of the estate which may go to charity.

[Tr. 126]

Copies of our work sheets used in making the calculations are attached.

Yours very truly,

WOLFE, CORCORAN AND LINDER

[Attached to the taxpayer's Exhibit 3 are three work sheets, which are not printed here.]

[Tr. 130]

**Taxpayer's Exhibit 4**

January 27, 1950

Greenbaum, Wolff & Ernst
285 Madison Avenue
New York 17, N. Y.

Gentlemen:

Re: Estate of Louis Sternberger, Deceased
Date of Death, June 25, 1947

On September 20, 1948 we submitted a computation of the value of a remainder interest under the will of the above deceased at date of death. Such value was contingent upon whether Eunice P. Sternberger, daughter, would have issue.

We have recomputed the value of the remainder interest based on exactly the same facts as stated in our letter of September 20, 1948, except that the value of the remainder has been made contingent upon whether Eunice P. Sternberger marries, without regard to issue. Briefly stated, our calculation represents the value at date of death of $1 payable upon the death of both the widow, age 62, and the daughter, age 27, provided that the daughter, who had been divorced three years previously, does not remarry.

In making this calculation we have used the Combined Experience Table of Mortality with 4% interest and the American Remarriage Table.

The value per $1 of remainder is $.18384.

We have previously sent you a photostatic copy of a work sheet showing the application of the American Remarriage rates to the number living according to the Combined Experience Table. We are attaching hereto a photostatic copy of our work sheet which shows the calculation of the value, $.18384, using the numbers

representing married and unmarried lives previously furnished you.

Yours very truly,

WOLFE, CORCORAN AND LINDER
By: DAVID SILVERMAN
David Silverman

[Attached to the taxpayer's Exhibit 4 is a work sheet, which is not printed here.]

---

[Tr. 132]

**Taxpayer's Exhibit 5**

MEMORANDUM

In Explanation of the Actuarial Tables used in Computations for the Estate of Louis Sternberger

Prepared by
David Silverman, F.C.A.S.,
of Wolfe, Corcoran and Linder
Consulting Actuaries
November 13, 1951

[Tr. 133]

*The Problem*

The problem here at hand is to determine the present value of a charitable remainder which is to take, if at all, upon the second death of two women, aged 27 and 62, provided the former, who is unmarried but divorced, shall die childless. The contingencies to be considered are, therefore, death, remarriage, birth, and the rate of interest. A brief discussion and explanation of each of these contingencies follows.

*Death Rates*

The death rate at any age may be defined as the probability that a person of that age will die within one

year. The death rates used for the present problem are those of the Combined Experience Mortality Table, which is the table prescribed by the Bureau of Internal Revenue for use in such cases.

### *Remarriage Rates*

A remarriage rate is the probability that a person previously married will remarry within one year. It is known that remarriage rates for women depend not only on age, but also on the time elapsed since the previous marriage. Under the present problem, it has been assumed that the charitable interest will take if the younger woman does not remarry.

Remarriage rate studies have not been as numerous as studies of death rates. The outstanding study based on American experience was that conducted by a Committee of the Casualty Actuarial Society and published as the American Remarriage Table in Volume 19, pp. 279-349, of that Society's Proceedings, in 1933. The following excerpt from the Committee's report gives some background of the table.

[Tr. 134]

> "*Source, Volume and Compilation of Data*
>
> The basic data were obtained from individual case reports submitted by insurance carriers, both private and state funds, in compliance with a call issued by the Committee through the National Council. The reports were limited to widows who, through the death of their husbands, became beneficiaries under workmen's compensation laws in states where their status as beneficiaries changes on remarriage. The reports filed covered the experience for policy years 1911 to 1929 inclusive."

On page 298, the following comment appears:

> "The American Remarriage Table based upon an adequate volume of American experience and constructed as outlined in the preceding paragraphs may with reasonable safety be adopted for countrywide use."

In the computations, the remarriage rates of the American Remarriage Table were combined with the death rates of the Combined Experience Mortality Table in order to determine the survivors and the deaths according to marital status. The results still represent the Combined Experience Mortality Table, the only additional feature being that survivors and deaths were divided into two categories, the married and the unmarried, as is illustrated by the following table:

| | | Number of Survivors out of 88,434 Unmarried Women at Age 27 | | |
|---|---|---|---|---|
| | Combined Experience | Combined Experience Mortality Table, Including Remarriage Rates | | |
| Age | Mortality Table | Unmarried | Married | Total |
| 30 | 86,292 | 71,669 | 14,623 | 86,292 |
| 40 | 78,653 | 50,307 | 28,346 | 78,653 |
| 50 | 69,517 | 39,683 | 29,834 | 69,517 |

### *Maternity Rates*

From the conditions of the present problem, the charitable interest may take, even if the woman aged 27 does remarry, provided that no issue results from the marriage. It is necessary, therefore, to consider birth rates, that is, the probability of a married woman giving birth to a child.

Unlike death rates and remarriage rates, maternity rates were not available in such explicit form as to be

[Tr. 135]

directly adaptable to the present problem. However, the United States Bureau of the Census has published very voluminous vital statistics and from this source maternity rates were especially computed for use in this specific case.

From Table 3 on page 89 of the Vital Statistics of the U.S., 1940, Part II, headed "Live Births by Age of Mother, Race and Number of Child: United States and Each State, 1940", the number of white, first born, children born throughout the United States during 1940, was determined according to the age of the mother. The only adjustment necessary was to exclude the 65,103 white births in Massachusetts because birth certificates in that state do not require the number of the child in order of birth, and so it could not be determined how many were first children. The data used, therefore, covers 766,674 first births in 47 states plus the District of Columbia.

It was necessary next to determine, by age of mother, and for the same geographical area, the number of married but childless women to serve as the proper exposures for the required maternity rates. The 1940 census release of the Bureau of the Census, Population Division, Series P-10, No. 6, furnished the total white female population in 1940, distributed by age, and also the number and proportion that were married. Also, from the population Division's Second Series, the number of white females in Massachusetts alone in 1940 was available, so that the white female married population of the United States, excluding Massachusetts, was determined.

From Table 9, page 119, of the 1940 Population Statistics, headed "Families by Race and Nativity of Head and Tenure, by Marital Status, Age, and Sex of Head, and Number of Children under 18 years Old,

for the United States, 1940", the total number of families and also the number and proportion of fam-

[Tr. 136]

ilies with no children under 18 was obtained. Study and adjustment of this data permitted determination of a close estimate of the percentages of all families that are childless, such percentages being available for the various ages of the wife. The application of these percentages to the white married female population, excluding Massachusetts, determined the number of white married females that were childless. The ratios of the number of first children born to the numbers of these females, by age, gave the required maternity rates.

As mentioned when remarriage rates were discussed, the introduction of maternity rates as well as remarriage rates into the Combined Experience Mortality Table in no wise alters the fact that the results still represent that Mortality Table. The only additional feature is that survivors and deaths are divided into three categories, as is illustrated by the following table:

Number of Survivors
out of 88,434 Unmarried Women at Age 27

| Age | Combined Experience Mortality Table | Combined Experience Mortality Table, Including Remarriage and Maternity Rates | | | |
|---|---|---|---|---|---|
| | | Unmarried | Married but Childless | Mothers | Total |
| 30 | 86,292 | 71,669 | 11,863 | 2,760 | 86,292 |
| 40 | 78,653 | 50,307 | 17,733 | 10,613 | 78,653 |
| 50 | 69,517 | 39,683 | 19,884 | 9,950 | 69,517 |

*Interest Rate*

The computation of the present value of a future payment necessarily involves the element of interest. The Bureau of Internal Revenue has prescribed a rate

of 4% per annum compounded annually, and this rate has been used in the computations.

*Tables Prepared for Computations*

Three tables, copies of which are attached hereto, have been prepared and designated as Exhibits I, I-A, and II. These tables are intended to reflect portions

[Tr. 137]

of the Combined Experience Mortality Table according to marital and maternal status.

In Exhibit I are shown the remarriage and death rates, numbers of survivors by marital status, and yearly decrements, by mode of exit, from the original group of 88,434 unmarried females. Figures are shown from ages 27 through 54, the latter age representing the child bearing age limit according to the statistics used for this purpose. Some figures shown for isolated higher ages were needed for purposes of computation.

Exhibit I-A is merely an extension of Exhibit I, carrying the figures down through age 78, the maximum age of remarriage according to the American Remarriage Table. These figures were needed for certain other computations, and the values at the two isolated advanced ages were similarly required.

Exhibit II breaks down the number of married females emerging in Exhibit I, acording to whether they are childless or mothers at the various ages. The maternity rates used and the numbers of survivors are shown, and the yearly decrements by mode of exit reflect the distinction made between mothers and other married females.

It is worthy of note that none of the tables attached or the computations based thereon consider the longevity of a child. The assumption made is that if the

woman aged 27 becomes a mother, then her first child will survive her.

[Attached to the taxpayers Exhibit 5 are the three tables therein referred to as Exhibits I, I-A, and II, which are not printed here]

---

[Tr. 141]

**Taxpayer's Exhibit 6**

Greenbaum, Wolff & Ernst
285 Madison Avenue
New York 17, N.Y.
Attention: Mr. William F. Wolff

November 1, 1949

Gentlemen:

Re: Estate of Louis Sternberger, Deceased

In connection with the value of the charitable remainder under the will of the above named deceased, we are submitting herewith certain additional facts which supplement our letter of September 20, 1948. The additional information relates to the problem and to the effect upon the remainder value of the contingency of illegitimate issue.

While the computations outlined in our letter of September 20, 1948 did not specifically cover this contingency, nevertheless, the methods employed did give some weight to the probability that a woman might give birth to an illegitimate child. In paragraph 8 we stated that the basic data used in the compilation of maternity rates was taken from the Bureau of the Census reports showing the number of births during 1940 according to the age of the mother. The number used covered all births, whether or not legitimate, so that the calculation of the maternity rates automatically included some provision for illegitimate children. However, it is true that this number of births was then re-

lated to the number of married women, the net effect being that our report of September 20, 1948 gave only partial effect to the contingency under consideration.

We have been able to secure some additional data with respect to illegitimate births which, for this purpose, may be considered to be reliable. The 1946 report on vital statistics published by the Federal Security Agency of the United States shows the following figures which represent the number of illegitimate children born to white mothers out of each 1,000 births.

| Year | Number |
|---|---|
| 1940 | 19.4 |
| 1941 | 19.0 |
| 1942 | 17.0 |
| 1943 | 16.3 |
| 1944 | 19.6 |
| 1945 | 22.8 |
| 1946 | 20.3 |

Since the former calculations were based primarily on the figures from the 1940 census, we have adopted the 19.4 per 1,000 proportion of illegitimate births in order to be consistent. Actually, the figure for this year is only slightly different from the average for the seven year period.

This proportion of 19.4 illegitimate births per 1,000 was used to adjust our former calculations which resulted in a value of the charitable remainder of $.24094 per $1 represented in the one-half of the estate which may go to charity. In effect, we have made an overall adjustment by subtracting 1.94% from the number of births which were related to married women, and then by applying 1.94% of the number born to unmarried women in the corresponding age group, to secure an overall rate of illegitimate birth. These two rates, added together, enabled us to adjust the value previously reported to you.

The net result is that the increased probability of issue reduces the value per $1 of remainder to charity from .24094 to .24058. The reduction in value is only about .2%. While this may appear to be a rather small reduction, it should be born in mind that our original calculation did make partial provision for illegitimate births and this reduction is intended only to provide for the additional probability of issue not previously accounted for. It is our opinion that the figure of .24058 does make full provision for the probability of issue, whether or not legitimate.

Yours very truly,

WOLFE, CORCORAN & LINDER

---

[Tr. 143]

**Taxpayer's Exhibit 7**

November 14, 1951

Greenbaum, Wolff & Ernst
285 Madison Avenue
New York 17, New York

Gentlemen:

Re: Estate of Louis Sternberger, Deceased
Date of Death June 25, 1947

We have reviewed the calculation of the value of the charitable remainder by Wolfe, Corcoran and Linder in accordance with the assumptions stated in their letter of September 20, 1948.

We find that such value was calculated in accordance with standard actuarial procedure.

We have also reviewed the calculation of the value by Wolfe, Corcoran and Linder in accordance with the assumptions stated in their letter of January 27, 1950 and

find that such value also was calculated in accordance with standard actuarial procedure.

Sincerely yours,

RICHARD FONDILLER
Fellow of Society of Actuaries
Fellow of Casualty Actuarial Society

RF:ea

---

[Tr. 144]

**Taxpayer's Exhibit 8**

Recueil de Documents
Relatifs
Aux Assurances Sur La Vie
Réunis
Par le Ministère du Travail
(Contrôle des assurances privées)

---

No. 10

---

Tables de Nuptialité et de Natalité
D'Après
Les Bases Fixées Par le Dècret du 22 Juin 1921,
Rendu en Exécution de L'Article 2 de la Loi du
26 Mai 1921,
Relative à la Surveillance et au Contrôle
Des Entreprises D'Assurance-Nuptialité et
D'Assurance-Natalité
[Medalion]
Paris

Imprimerie Nationale

---

1922

[Tr. 145]

## Table V

### Table of Reproductive Rates

| Father's age | Males | Mother's age | Females |
|---|---|---|---|
| 15 years | " | 15 years | 0.4092 |
| 16 " | " | 16 " | 0.3061 |
| 17 " | " | 17 " | 0.2731 |
| 18 " | 0.4471 | 18 " | 0.2633 |
| 19 " | 0.3292 | 19 " | 0.2641 |
| 20 " | 0.2932 | 20 " | 0.2690 |
| 21 " | 0.2843 | 21 " | 0.2736 |
| 22 " | 0.2872 | 22 " | 0.2746 |
| 23 " | 0.2946 | 23 " | 0.2700 |
| 24 " | 0.3013 | 24 " | 0.2595 |
| 25 " | 0.3031 | 25 " | 0.2445 |
| 26 " | 0.2977 | 26 " | 0.2270 |
| 27 " | 0.2855 | 27 " | 0.2088 |
| 28 " | 0.2677 | 28 " | 0.1916 |
| 29 " | 0.2472 | 29 " | 0.1759 |
| 30 " | 0.2263 | 30 " | 0.1620 |
| 31 " | 0.2065 | 31 " | 0.1498 |
| 32 " | 0.1885 | 32 " | 0.1389 |
| 33 " | 0.1727 | 33 " | 0.1280 |
| 34 " | 0.1588 | 34 " | 0.1192 |
| 35 " | 0.1464 | 35 " | 0.1095 |
| 36 " | 0.1353 | 36 " | 0.0993 |
| 37 " | 0.1250 | 37 " | 0.0886 |
| 38 " | 0.1151 | 38 " | 0.0774 |
| 39 " | 0.1055 | 39 " | 0.0661 |
| 40 " | 0.0958 | 40 " | 0.0554 |
| 41 " | 0.0861 | 41 " | 0.0455 |
| 42 " | 0.0765 | 42 " | 0.0368 |
| 43 " | 0.0672 | 43 " | 0.0249 |
| 44 " | 0.0584 | 44 " | 0.0164 |
| 45 " | 0.0503 | 45 " | 0.0107 |

| Father's age | Males | Mother's age | Females |
|---|---|---|---|
| 46 " | 0.0430 | 46 " | 0.0071 |
| 47 " | 0.0365 | 47 " | 0.0048 |
| 48 " | 0.0306 | 48 " | 0.0033 |
| 49 " | 0.0263 | 49 " | 0.0023 |
| 50 " | 0.0223 | 50 " | 0.0017 |

U. S. GOVERNMENT PRINTING OFF CE 1953—252945/P D 1571

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR, RESPONDENT.

On Petition for Review of the Decision of the Tax Court of the United States

# RESPONDENT'S APPENDIX

GREENBAUM, WOLFF, & ERNST,
*Attorneys for Respondent*

EDWARD S. GREENBAUM,
WILLIAM F. WOLFF, JR.,
MAURICE C. GREENBAUM,
CHARLES E. HEMING,
*Of Counsel.*

Filed October 2, 1953. A. M. BELL, *Clerk*, United States Court of Appeals, Second Circuit.

## APPENDIX

### EXHIBIT 2

* * * * *

FIRST: I hereby amend and modify Article "SEVENTH" of my aforesaid last Will and Testament so that the said Article "SEVENTH" will now read as follows:

"Seventh: I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatever kind and nature and wherever situated, of which I shall die seized or possessed or over which I shall have any power of disposition of appointment, or in which I shall have any interest, to my Trustee to hold the same in trust during the period of the joint lives of my wife, EUNICE E. STERNBERGER and our daughter EUNICE P. STERNBERGER, and the life of the survivor of them, to keep the same invested and to do and perform the following acts and things:

*First: as to Income:* To collect the income therefrom and after paying all proper charges to pay the net annual income as follows:

a) The Trustee shall pay to my wife EUNICE E. STERNBERGER, fifty per cent (50%) of such net income during the

life of our daughter EUNICE P. STERNBERGER and in the event of the demise of our daughter EUNICE P. STERNBERGER thereafter such sums as hereinafter provided. Said income will be paid during said EUNICE E. STERNBERGER's life in monthly installments.

b) The Trustee shall pay to my daughter EUNICE P. STERNBERGER, the remaining fifty per cent (50%) of such net income in monthly installments during the life of my wife EUNICE E. STERNBERGER and in the event of the demise of my said wife, shall pay to said EUNICE P. STERNBERGER the entire net income of the trust in monthly installments during her life.

c) If my daughter EUNICE P. STERNBERGER shall die before EUNICE E. STERNBERGER, then the Trustee shall pay the entire net income of the trust as follows:

1. Sixty percent (60%) thereof to EUNICE E. STERNBERGER during her life.

2. Forty percent (40%) thereof to EUNICE P. STERNBERGER's descendants in equal shares per stirpes as that class may from time to time be constituted, and at such time as no person in such class shall then survive then to pay said income to my niece BLANCHE R. VOLFF and my grandnephews WILLIAM F. WOLFF, JR., and JAMES A. VOLFF or such of them as may be surviving for the time being in equal shares except that if either WILLIAM F. WOLFF, JR. or JAMES A. WOLFF shall die his descendants as the class may from time to time be constituted shall receive the income said WILLIAM F. WOLFF, JR. or JAMES A. WOLFF would have been entitled to, if living, in equal shares per stirpes. At such time as there be none of said persons surviving, the trustee shall pay such income to the charities entitled to receive income under the following paragraph numbered "Second".

*Second: as to Principal:* Upon the death of the survivor of EUNICE E. STERNBERGER and EUNICE P. STERNBERGER, the Trustee shall transfer, assign and set over the net principal of the Trust as the same shall then consist to the descendants then living of said EUNICE P. STERNBERGER in equal shares *per stirpes*, and if there be no such descendants living upon the death of the survivor, then the Trustee shall transfer, assign and set over one half (1/2) the net principal of the trust to BLANCHE R. WOLFF, WILLIAM F. WOLFF, JR., and JAMES A. WOLFF or such of them as may be then surviving in equal shares except that if either JAMES A. WOLFF or WILLIAM F. WOLFF, JR., is then deceased his descendants shall receive the share the said JAMES A. WOLFF or WILLIAM F. WOLFF, JR., would have been entitled to, if living, in equal shares per stirpes; and said Trustee shall continue to hold the other one half (1/2) of the net principal of trust or the whole of said principal if none of the persons above mentioned

shall then survive in trust and shall pay over the net annual income thereof in perpetuity as follows:

a) One-quarter (1/4) thereof to NATIONAL JEWISH HOSPITAL AT DENVER.

b) One-quarter (1/4) thereof to FEDERATION FOR THE SUPPORT OF JEWISH PHILANTHROPIC SOCIETIES OF NEW YORK CITY.

c) One-quarter (1/4) thereof to THE PRESBYTERIAN HOSPITAL IN THE CITY OF NEW YORK.

d) One-quarter (1/4) thereof to one or more organizations for the welfare and betterment of the Negro race selected by the Trustee;

provided that if any of the foregoing organizations shall have ceased to exist, or if an organization named in (c) or (d) shall cease to be nonsectarian (determined as provided below) in the conduct of its affairs, the Trustee shall pay over the share of income to which such organization would otherwise have been entitled to a generally similar nonsectarian charity selected by it. The Trustee for the purpose of determining nonsectarianism under this paragraph shall be entitled to rely upon an affidavit affirming the fact thereof made by an officer of the organization in question, unless affirmative evidence of sectarianism shall be brought to its attention, in which event it may request instructions of any court having jurisdiction."

OFFICIAL REPORT OF PROCEEDINGS BEFORE THE TAX COURT OF THE UNITED STATES

[Caption]

Hearing at New York, N. Y.
Date: November 15, 1951.
[Tr. 79]

* * * * *

MR. CHARSHEE: Your Honor, with respect to the first issue, the Commissioner has relied upon *Humes versus United States*, 276 U. S. 487. In the *Humes* case, there was a need, a young girl of 15 years of age, and if she had a child before she was 40 the charitable contributions would have been defeated. Now, with respect to whether or not that young lady would have a child prior to the time she was 40 the Supreme Court made the following statement:

"Neither the taxpayer nor revenue officer, even if equipped with all the aid which the actuarial art can supply, could do more than guess at the value of this contingency."

In other words, in that case, there was an actuarial table submitted to the Supreme Court, and Justice Brandeis, I think it was,

said that it lent no value to the Court, that it was a mere guess as to whether or not a young woman of that age would have a child prior to the time she was 40. And relying on that language of the Supreme Court, the same situation exists here, and we think it can be nothing more nor less than a guess as to whether or not this young woman of 27 would have a child, and therefore we think no value could be placed upon these contingent remainders.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1953

No. 34

Argued October 15, 1953. Decided November 6, 1953

Docket No. 22701

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR, RESPONDENT

Before: L. HAND, SWAN and A. N. HAND, *Circuit Judges*

Appeal from a decision of the Tax Court of the United States (18 T. C. 836), BLACK, *Judge*

*Melva M. Graney*, for the petitioner.
*Edward S. Greenbaum*, for the respondent.

PER CURIAM:

The judgment of the Tax Court is affirmed on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2).

[Endorsed:] United States Court of Appeals, Second Circuit. Commissioner of Internal Revenue v. Estate of Louis Sternberger. (34). Judgment. United States Court of Appeals, Second Circuit Filed November 6, 1954[3]. Alexander M. Bell, Clerk.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of November one thousand nine hundred and fifty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, *Circuit Judges*

Commissioner of Internal Revenue, petitioner

*v.*

Estate of Louis Sternberger & Chase National Bank, Executor, respondent

Appeal from The Tax Court of the United States

This cause come on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

(S.) Alexander M. Bell,
*Clerk.*

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, A. Daniel Fusaro, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 71, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Commissioner of Internal Revenue against Estate of Louis Sternberger as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto fixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of January in the year of our Lord one thousand nine hundred and fifty-four, and of the Independence of the said United States the one hundred and seventy-eighth.

[seal.] (S.) A. Daniel Fusaro,
*Clerk.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 204464 O/K

Supreme Court of the United States

No. 574, October Term, 1953

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

*Order allowing certiorari*

Filed April 5, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Charitable Deduction - Corpus ?

Supreme Court, U. S.
FILED
SEP 3 1954
HAROLD B. WILLEY, Clerk

No. — [redacted] 24

# In the Supreme Court of the United States

OCTOBER TERM, 1953

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute and Regulations involved | 2 |
| Statement | 4 |
| Specification of errors to be urged | 7 |
| Reasons for granting the writ | 7 |
| Conclusion | 14 |


## CITATIONS

Cases:


| | |
|---|---|
| *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 | 12 |
| *Helvering* v. *Union Trust Co.*, 125 F. 2d 401, certiorari denied, 316 U. S. 696 | 12 |
| *Henslee* v. *Union Planters Bank*, 335 U. S. 595 | 12, 13 |
| *Humes* v. *United States*, 276 U. S. 487 | 10, 11 |
| *Ithaca Trust Co.* v. *United States*, 279 U. S. 151 | 11, 13 |
| *Knoernschild* v. *Commissioner*, 97 F. 2d 213 | 12 |
| *Meierhof* v. *Higgins*, 129 F. 2d 1002 | 7, 9, 10 |
| *Merchants Bank* v. *Commissioner*, 320 U. S. 256 | 10, 12 |
| *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197, certiorari denied, 293 U. S. 604 | 12 |
| *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175 | 7-8, 9 |
| *Norris* v. *Commissioner*, 134 F. 2d 796, certiorari denied, 320 U. S. 756 | 12 |
| *United States* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85, certiorari denied, 299 U. S. 575 | 12 |
| *United States* v. *Provident Trust Co.*, 291 U. S. 272 | 11 |


Statutes:


| | |
|---|---|
| Internal Revenue Code, Sec. 812 (26 U.S.C. 1946 ed., Sec. 812) | 2, 7 |
| Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 403 | 9 |


Miscellaneous:


| | |
|---|---|
| Treasury Regulations 37 (Revised, 1919, and Revised January, 1921, eds.), Art. 56 | 9 |
| Treasury Regulations 63, Art. 50 | 9 |
| Treasury Regulations 68, Art. 47 | 9, 10 |
| Treasury Regulations 70 (1926 and 1929 eds.), Art. 47 | 9 |
| Treasury Regulations 80 (1934 and 1937 eds.), Art. 47 | 9 |
| Treasury Regulations 105: | |
| Sec. 81.44 | 3, 10 |
| Sec. 81.46 | 4, 7, 9, 10, 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1953

---

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in this case.

### OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 2-11) are reported at 18 T.C. 836. The *per curiam* opinion of the Court of Appeals (R. 66) is reported at 207 F. 2d 600.

### JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1953. (R. 67.) The juris-

diction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTION PRESENTED

Whether the court below erred in affirming the Tax Court's holding that the decedent's estate is entitled to a charitable bequest deduction under Section 812 (d) of the Internal Revenue Code for contingent remainders to designated charities under which the charities will take only if the decedent's daughter (age 27 at the decedent's death) dies without leaving issue or other descendants surviving her and her mother.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 812. NET ESTATE.
>
> For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *
>
> (d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.
> (26 U.S.C. 1946 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.44 *Transfers for public, charitable, religious, etc., uses.*—* * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. Section 81.10 indicates the principles to be applied in the computation of the present worth of deferred uses, but such computation will not be made by the Commissioner on behalf of the executor. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to the charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. To determine the present value of such remainder, use the appropriate factor in column 3 of Table A or B of section 81.10. If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or in any other manner rendering inapplicable Table A or B of section 81.10, the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in section 81.10, by one skilled in actuarial computations.

* * * * *

SEC. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The facts found by the Tax Court (R. 4-8) may be summarized as follows:

Louis Sternberger, the decedent, died on June 25, 1947. The executors of his estate filed a federal estate tax return disclosing a gross estate of $2,406,541.71. The gross estate consisted of certain assets which the decedent owned at the date of his death and other assets held in a revocable trust he had

created on January 20, 1931, of which he was the primary life beneficiary. In the estate tax return, the executors claimed the amount of $179,154.19 as a charitable deduction representing the alleged value of contingent charitable remainders provided for in the decedent's will and in the *inter vivos* trust of January 20, 1931. (R. 4-6.)

As of the date of the decedent's death, the dispositive provisions of the *inter vivos* trust (after a specific bequest of $5,000) were in all respects identical with the dispositive provisions of the residuary clause of the decedent's will. (R. 5.)

The will provided that the decedent's residuary estate is to be held in trust during the joint lives of the decedent's wife, Eunice E. Sternberger, and his daughter, Eunice P. Sternberger, and the survivor of them and, upon the death of the survivor, the principal is to be paid in equal shares to "the descendants then living" of his daughter, *per stirpes*, and, in the event there are none such, one-half to certain collateral relatives of the decedent then living and one-half to certain charitable organizations. In the event no collateral relatives are then living, the entire principal is to be paid to the charitable organizations. (R. 5.)

The decedent's wife survived him and was 62 years of age at the date of his death. The decedent's daughter also survived him and was 27 years of age at the date of his death. She had been previously married and was divorced on March 31, 1944. At the date of the decedent's death, she was unmarried and had had no children. (R. 6.)

At the Tax Court hearing, the executors of the decedent's estate introduced actuarial evidence designed to show the value of the contingent charitable remainders as of the decedent's death. This evidence related to computations based upon (1) the joint life expectancy of the decedent's wife and daughter, as determined from mortality tables, (2) the probability of the daughter remarrying, as determined from the American Remarriage Table published by the Casualty Actuary Society, and (3) the probability of a child being born to the decedent's daughter, as determined from a table prepared by one of the testifying actuaries in accordance with accepted actuarial principles based upon data taken from the 1940 census. In making the computations, it was assumed that, if the decedent's daughter married and became the mother of a child, the child would survive her. It was also assumed that there would be someone in the group of collateral relatives who would be living at the deaths of the decedent's wife and daughter, so that not more than 50 per cent of the principal of the trusts would pass to the named charitable organizations. The computations resulted in a figure of $.24094 per dollar of trust corpus based on legitimate descendants of the daughter and of $.24058 including illegitimates. (R. 6-8.)

The Tax Court held that the decedent's estate is entitled to a deduction under Section 812 (d) of the Internal Revenue Code for the contingent remainders to charity. Decision was based, first, upon an assumption that Section 812 (d) allows a deduction

for contingent remainders and secondly, upon an acceptance of the actuarial computation of $.24058 per dollar of trust corpus as a reliable estimate of the value of the contingent remainders as of the decedent's death. (R. 8-11.) The Court of Appeals affirmed the Tax Court "on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2)." (R. 66.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In allowing a deduction under Section 812 (d) of the Internal Revenue Code for a charitable bequest which was wholly contingent as of the decedent's death.

2. In failing to apply Section 81.46 of Treasury Regulations 105, which provides that no deduction is allowable under Section 812 (d) for a conditional charitable bequest under which the possibility that the charities will not take is not so remote as to be negligible.

3. In premising deductibility under Section 812 (d) on an actuarial computation which merely reflected the charities' chances of taking all or nothing and which was nothing more than a guess even as to the value of the charities' contingent interest.

REASONS FOR GRANTING THE WRIT

1. The decision below, holding that the actuarial value of a contingent charitable remainder is deductible under Section 812 (d) of the Internal Revenue Code, *supra*, p. 2, is squarely in conflict with the decision of the First Circuit in *Newton Trust*

*Co.* v. *Commissioner*, 160 F. 2d 175. That case (pp. 180-182) presented a situation which, because it involved a contingent power of invasion, was treated as equivalent to a trust to pay the income to A for life and upon the death of A remainder to B, if B survives A, and if B does not survive A then over to charity. Since A and B were the same age and their life expectancy was the same, the taxpayer contended that the value of the contingent remainder to charity could be actuarially computed by using a 50 per cent factor. The Court of Appeals for the First Circuit stated that it did not question the correctness of the taxpayer's actuarial computation nor its use in other situations (pp. 180-181) but that there was no certainty that the charity would take 50 per cent of the trust corpus, but rather that the charity had a fifty-fifty chance of getting all or nothing. The Court of Appeals accordingly denied the claimed deduction because there was an even chance that the charity would not take and Section 81.46 of Treasury Regulations 105, *supra*, p. 4, entitled "Conditional bequests", provides that no deduction is allowable for a conditional bequest unless the possibility that the charity will not take is so remote as to be negligible.

In the present case, the contingent charitable remainders were conditioned upon the failure of the decedent's daughter (who was 27 years of age at the decedent's death) to leave issue surviving her and her mother. The acturial computation of the value of the contingent charitable remainders was

her mother, the probability that the daughter would remarry, and the probability that she would have issue. The result was a figure of $.24058 per dollar of trust corpus (including illegitimates) which of course did not represent what the charities were certain to receive. It was a "percentage figure" (R. 26) representing the charities' chances of taking all or nothing, showing that there was a three-to-one chance that the charities would *not* take anything. This, of course, was not a possibility so remote as to be negligible. Instead of applying Section 81.46 of Treasury Regulation 105, as it was requested to do, the court below affirmed "on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2)" (R. 66), in which it had disregarded the then applicable regulation entitled "Conditional bequests" and held that a contingent bequest to charity is deductible if it has a market value. The result is a decision in direct conflict with the decision of the First Circuit in the *Newton Trust Co.* case.[1]

---

[1] Ever since Congress first authorized the deduction of charitable bequests in Section 403(a)(3) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the pertinent Treasury Regulations have contained an article entitled "Conditional bequests" which in effect provided that no deduction is allowable for a bequest which is conditional as of the decedent's death. See Article 56 of Treasury Regulations 37 (Revised, 1919, and Revised January, 1921, eds.), promulgated under the Revenue Act of 1918; Article 50 of Treasury Regulations 63, promulgated under the Revenue Act of 1921; Article 47 of Treasury Regulations 68, promulgated under the Revenue Act of 1924, of Treasury Regulations 70 (1926 and 1929 eds.), promulgated under the Revenue Act of 1926, and of Treasury Regulations 80 (1934 and 1937 eds.), promulgated under the Revenue Acts of 1926 and 1932, as amended; and Article 81.46 of Treasury Regulations 105. In *Meierhof* v. *Higgins*, 129 F. 2d 1002 (C. A.

2. The decision below is also in conflict with *Humes* v. *United States*, 276 U. S. 487, and decisions which have interpreted and applied it. The *Humes* case involved the deductibility of a contingent charitable bequest under which the charities would take a trust remainder if the decedent's niece (15 years of age and unmarried at the decedent's death) should die without issue before attaining the age of 40. In denying the claimed deduction, the Court regarded an actuarial computation of present value as "mere speculation bearing the delusive appearance of accuracy" (p. 494) and held that Congress

---

2d), the pertinent regulation was Article 47 of Treasury Regulations 68, which provided in part as follows:

> *Conditional bequests.*—Where the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

In the *Meierhof* case the Second Circuit held (p. 1005) that this language was not controlling, stating that it should be read in connection with quoted provisions of Article 44 (which are presently contained in Article 81.44 of Treasury Regulations 105, *supra*, p. 3, relating to trusts created for both a charitable and private purpose), and went on to hold that a contingent charitable bequest is deductible if it has a market value. Subsequently, this Court decided *Merchants Bank* v. *Commissioner*, 320 U. S. 256, in which the Court clearly indicated that the regulation covering conditional bequests must be given effect and that the regulation covering trusts created for both a charitable and a private purpose has reference only, for example, to a trust under which the income is payable to an individual for life and the remainders to charity. In the present case we relied upon the present regulation covering "Conditional bequests" (Section 81.46 of Treasury Regulations 105) in both the Tax Court, where, however, we merely quoted the regulation, and in the court below, where we in detail pointed out all of the above in our brief. The court below nevertheless decided the case on the authority of its *Meierhof* decision.

did not intend to allow a deduction for a contingent bequest whose value could only be guessed at. In *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, which involved the deductibility of a charitable bequest of trust corpus subject to invasion for the benefit of the life tenant, the *Humes* decision was cited (p. 154) for a statement that the question was whether the power of invasion made the gifts to charity "so uncertain" that deduction for the charitable remainder could not be allowed. In *United States* v. *Provident Trust Co.*, 291 U. S. 272, deduction was allowed for a contingent charitable remainder only because the contingency on which the charities' right to take was, as a practical matter, non-existent.[2] Following these decisions, and in contrast to the court below, several Courts of Appeals have held, with or without reference to the pertinent Treasury Regulations, that conditional

---

[2] The *Provident Trust Co.* case involved the deductibility of the value of a contingent remainder under which charities would take if the decedent's daughter died without issue. At the decedent's death the daughter was 50 years of age, had no issue, and had had an operation which rendered her incapable of giving birth to a child. In contending that the value of the remainder was not deductible, the Government relied upon the restriction in respect of issue, arguing that a woman is presumed to be capable of bearing children as long as she lives. The Court allowed the deduction, holding that the presumption was open to rebuttal and that (p. 286)—

> the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem. • • •

The present Treasury regulation covering "Conditional bequests" recognizes that the deduction is allowable in such a case by providing for allowance of the deduction when the happening of the event constituting the contingency is highly improbable.

charitable bequests are not deductible under Section 812 (d) of the Code or its identical predecessors. See, e.g., *Helvering* v. *Union Trust Co.*, 125 F. 2d 401, 403 (C. A. 4th), certiorari denied, 316 U. S. 696; *Norris* v. *Commissioner*, 134 F. 2d 796 (C. A. 7th), certiorari denied, 320 U. S. 756; *Knoernschild* v. *Commissioner*, 97 F. 2d 213 (C. A. 7th); *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 (C. A. 8th); *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197 (C. A. 8th), certiorari denied, 293 U. S. 604; *United States* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85 (C. A. 10th), certiorari denied, 299 U. S. 575.

3. In allowing a deduction for a contingent charitable bequest, the decision below is also in conflict in principle with this Court's decision in *Merchants Bank* v. *Commissioner*, 320 U. S. 256, and in *Henslee* v. *Union Planters Bank*, 335 U. S. 595. The *Merchants Bank* case involved the deductibility of a charitable remainder of trust corpus which was subject to invasion for the "comfort, support, maintenance, and/or happiness" of the decedent's wife, the life tenant. (P. 258.) The charitable bequest was thus conditional in the sense that the charities had a right to receive only the corpus not used by the decedent's wife. The case was accordingly covered by the second paragraph of the applicable Treasury regulation entitled "Conditional bequests", which was identical to the second paragraph of the present Section 81.46 of Treasury Regulations 105. In denying the claimed deduction, the Court stated that for the deduction to be allowed

Congress and the Treasury require that a highly reliable appraisal "of the amount the charity will receive" be available and made at the death of the testator and that rough guesses, approximations, and even market value are not sufficient. (P. 261.) The deduction was denied because the possibility of use of the trust corpus by the decedent's wife introduced a contingency which made it impossible to determine accurately what the charity would ultimately receive. *Henslee* v. *Union Planters Bank*, *supra*, was a similar case in which, as the Court stated (p. 599), contingent remainders to charity could be "diminished or destroyed" by a power of invasion. The Court referred to "the test of present ascertainability of the *ultimate* charitable interest" (italics supplied) (p. 600) and stated that the contingency which would have diminished or destroyed the charitable interest might well have been insured against "but such an arithmetic generalization of experience would not have made this charitable interest 'presently ascertainable' " (p. 599) —that though there was little chance that the charitable remainder would be diminished or destroyed, the fact that the chance remained precluded the deduction. These two cases therefore stand for the proposition that the deduction is allowed only for the present value of what the charities are certain to receive in the future (with such slight variation as is allowed by *Ithaca Trust Co.* v. *United States*, 279 U. S. 151), not, as the court below held, for the present value of a contingent interest representing only a possibility of receipt.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
*Acting Solicitor General.*

FEBRUARY, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE 1954 897708 979

Olmer

Office - Supreme Court, U. S.
FILED
MAR 26 1954
HAROLD B. WILLEY, Clerk

No. [redacted] 24

# In the Supreme Court of the United States

OCTOBER TERM, 1953

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE [redacted]

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

# In the Supreme Court of the United States

OCTOBER TERM, 1953

---

No. 574

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**REPLY TO RESPONDENT'S BRIEF IN OPPOSITION**

---

1. In attempting to deny the existence of conflicts between the decision below and the cases cited in our petition (pp. 7-13), the respondent argues that the latter cases involved types of contingent interests which were different from that involved in the present case and were types which were not subject to present valuation. Our assertion of conflict, however, was not with respect to the question of valuation of contingent charita-

ble interests. We assert that a conflict of decisions exists in that the decision below is contrary to numerous cases which either expressly or impliedly hold that *any contingent* charitable interest, regardless of whether a present value can be placed upon it actuarially, is not deductible where, as here, the possibility that the charity will not take is not so remote as to be negligible.

In discussing *Newton Trust Co. v. Commissioner*, 160 F. 2d 175 (C.A. 1st), the respondent misconstrues the first part of the opinion and ignores the second part (pp. 180-182) on which our assertion of square conflict is based. That case involved a bequest of a charitable remainder of trust corpus subject to a power of invasion in favor of the decedent's wife. In the first part of its opinion, the Court of Appeals for the First Circuit held that the power of invasion was not limited by any fixed standard and thus did not lend itself to a reliable determination of the amount the charity would ultimately receive. The power of invasion thus extended to the entire trust corpus and made the charitable remainder interest *contingent*, and for that reason the Court of Appeals held that under *Merchants Bank* v. *Commissioner*, 320 U.S. 256, the charitable interest was not deductible. In addition, the taxpayer in the *Newton Trust Co.* case also argued that deduction was allowable on the ground that the power of invasion, because it covered the decedent's interest in property held in trust under his father's will, could not be exercised in favor of the decedent's widow until the

death of the decedent's brother. The taxpayer argued that the power of invasion simply constituted a condition to the right of the charity to take the entire trust corpus—that, although the death of the decedent's brother prior to the decedent's widow would defeat the deductibility of the charitable interest, the charity would take the entire corpus if the widow predeceased the brother. The First Circuit answered these arguments by stating that, while it had no doubt that the contingent interest could be valued actuarially as of the decedent's death, the actuarial valuation represented the charity's chances of taking all or nothing, instead of the present value of what the charities would receive, and that no deduction is allowable under Section 81.46 of Treasury Regulations 105 for a *contingent* charitable interest under which the charity's chances of not taking are not so remote as to be negligible. In that connection the court expressly refused to follow *Meierhof* v. *Higgins*, 129 F. 2d 1002 (C.A. 2d), which involved a prior regulation covering conditional bequests but which was cited by the court below as the sole authority for its decision in the instant case involving the identical regulation applied in the *Newton Trust Co.* case.

Similarly, while the respondent may be correct in stating that the Court of Appeals decisions cited on page 12 of our petition involved contingent charitable interests which were not susceptible of actuarial valuation, the cases were decided not on that ground but on the ground that no deduction

is allowable for a charitable interest which is subject to a substantial contingency as of the decedent's death.

*Merchants Bank* v. *Commissioner, supra,* and *Henslee* v. *Union Planters Bank,* 335 U. S. 595, cannot properly be distinguished on the ground they involved charitable remainders of trust corpus subject to a power of invasion or charitable interests which were not subject to valuation as of the decedent's death. Actually, the charitable interests involved in those cases undoubtedly had a market value, but market value and value based on "an arithmetic generalization of experience" (*Henslee* v. *Union Planters Bank, supra,* p. 599) were held to be immaterial. The respondent concedes that in those cases the claimed deductions were denied because the amount the charity would receive was not determinable for lack of a provision limiting the power of invasion to a fixed standard (Br. 6), but overlooks the significance of the lack of a fixed standard of invasion. The claimed deductions were denied because, for lack of a limitation on the power of invasion, there was a chance that the charity's interest would be diminished or destroyed (see *Henslee* v. *Union Planters Bank, supra,* p. 599); in other words, because the charitable interest was contingent.

2. In addition to presenting a conflict of decisions, the decision below raises the important question whether Section 81.46 of Treasury Regulations 105 is valid. That regulation covers "Conditional bequests" and the first paragraph expressly pro-

vides that no deduction is allowable for a charitable interest which is contingent as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible. In the *Newton Trust Co.* case the First Circuit applied this provision of the Regulations, thus recognizing it to be valid. However, although the regulation is clearly applicable to the facts of the present case, the court below refused to apply it and thus in effect held it to be invalid.

The decision below creates confusion in respect of the law governing the deductibility of contingent charitable interests. Since bequests of contingent charitable interests occur quite frequently, the decision below will encourage litigation in other cases and complicate the administration of Section 812 (d). The validity of the regulation thus involves an important and recurring question which should be settled by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
*Solicitor General.*

MARCH, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 209076 1093

Office Supreme Court, U. S.
FILED
AUG 23 1954
HAROLD B. WILLEY, Clerk

No. 24

# In the Supreme Court of the United States

OCTOBER TERM, 1954

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

SIMON E. SOBELOFF,
*Solicitor General,*
H. BRIAN HOLLAND,
*Assistant Attorney General,*
ELLIS N. SLACK,
ROBERT N. ANDERSON,
MELVIN M. CRANEY,
*Special Assistants to the Attorney General,*
*Department of Justice,*
*Washington 25, D. C.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statute and regulations involved | 2 |
| Question presented | 4 |
| Statement | 4 |
| Summary of argument | 7 |
| Argument: | |
| The decedent's estate is not entitled to a deduction under Section 812(d) of the Internal Revenue Code for the contingent charitable remainders | 11 |
| A. The charitable remainders, being contingent, are not deductible under the pertinent Treasury Regulations | 13 |
| 1. The first paragraph of Section 81.46 of Treasury Regulations 105 validly provides that no deduction is allowable for a transfer to charity which is conditional as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible | 13 |
| 2. The first paragraph of Section 81.46 of Treasury Regulations 105 does not not permit a deduction in this case | 25 |
| B. Apart from the regulations now applicable, the decisions hold that contingent charitable bequests are not deductible | |
| C. The evidence as to the actuarial value of the contingent charitable remainders does not in any event support the deduction | 37 |
| Conclusion | 40 |

## CITATIONS

Cases:


Page

*Allen* v. *First Nat. Bank of Atlanta*, 169 F. 2d 221 ..... 22, 32, 33
*Baker* v. *Commissioner*, 205 F. 2d 369..... 31
*Burdick* v. *Commissioner*, 117 F. 2d 972, certiorari denied, 314 U. S. 631..... 31, 33, 35
*Commissioner* v. *South Texas Co.*, 333 U. S. 496... 18-19
*Churchill* v. *United States*, 68 F. Supp. 267..... 22, 31, 33
*City Bank Farmers' Trust Co.* v. *United States*, 5 F. Supp. 871, affirmed, 74 F. 2d 692..... 31, 32, 33
*Davison* v. *Commissioner*, 81 F. 2d 16..... 31, 34, 36
*Delaware Trust Co.* v. *Handy*, 53 F. 2d 1042..... 32, 33
*Farrington* v. *Commissioner*, 30 F. 2d 915, certiorari denied, 279 U. S. 873..... 16, 32
*First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 ..... 31, 34
*Gammons* v. *Hassett*, 121 F. 2d 229, certiorari denied, 314 U. S. 673 ..... 31
*Gardiner* v. *Hassett*, 63 F. Supp. 853..... 35
*Gaston Estate* v. *Commissioner*, 2 T. C. 672... 32, 33, 34
*Graff* v. *Smith*, 100 F. Supp. 42..... 22, 31, 33, 34
*Helvering* v. *Richter*, 312 U. S. 561..... 13
*Helvering* v. *Union Trust Co.*, 125 F. 2d 401, certiorari denied, 316 U. S. 696..... 31, 33, 35
*Helvering* v. *Winmill*, 305 U. S. 79..... 18
*Henslee* v. *Union Planters Bank*, 335 U. S. 595. 21, 29, 30
*Hoagland* v. *Kavanagh*, 36 F. Supp. 875..... 31, 33, 34
*Hormel* v. *Helvering*, 312 U. S. 552..... 13
*Humes* v. *United States*, 276 U. S. 487..... 11, 27, 39
*Ithaca Trust Co.* v. *United States*, 279 U. S. 151... 28
*Knoernschild* v. *Commissioner*, 97 F. 2d 213..... 31, 33
*Meierhof* v. *Higgins*, 129 F. 2d 1002, 9, 10, 11, 12, 13, 23, 25, 35, 36, 39
*Merchants Bank* v. *Commissioner*, 320 U. S. 256, 9, 10, 13, 14, 17, 19-21, 25, 27, 29, 30, 36
*Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197, certiorari denied, 293 U. S. 604..... 31, 34
*National Bank of Commerce of San Antonio* v. *Scofield*, 169 F. 2d 145, certiorari denied, 335 U. S. 907..... 31

Cases—Continued

Page

*Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175, 9, 22, 25, 26, 31, 33
*Ninth Bank & Trust Co.* v. *United States*, 15 F. Supp. 951 ..... 16, 32
*Norris* v. *Commissioner*, 134 F. 2d 796, certiorari denied, 320 U. S. 756 ..... 31, 33
*Robinette* v. *Helvering*, 318 U. S. 184 ..... 38
*Taft* v. *Commissioner*, 304 U. S. 351 ..... 18
*United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459 ..... 18
*United States* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85, certiorari denied, 299 U. S. 575 ..... 35
*United States* v. *Provident Trust Co.*, 291 U. S. 272 ..... 16, 26, 28, 32
*Wood* v. *United States*, 20 F. Supp. 197 ..... 31, 33, 34

Statutes:

Internal Revenue Code, Sec. 812 (26 U.S.C. 812), 2, 7, 8, 10, 11, 18, 19, 27, 31, 36
Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 403 ..... 18

Miscellaneous:

Revenue Ruling 54-285, Int. Rev. Bul., July 19, 1954, p. 5 ..... 28
Statistical Abstract of the United States (1952), Table 83, p. 78 .....
Treasury Regulations 37 (Revised, 1919, and Revised January, 1921 eds.):
Art. 53 ..... 15
Art. 56 ..... 15
Treasury Regulations 63:
Art. 48 ..... 15
Art. 50 ..... 15
Treasury Regulations 68:
Art. 45 ..... 15
Art. 47 ..... 15
Treasury Regulations 70 (1926 and 1929 eds.):
Art. 44 ..... 15
Art. 47 ..... 15

Miscellaneous—Continued

Page

Treasury Regulations 80 (1934 and 1937 eds.):
Art. 44 ..... 15, 24
Art. 47 ..... 17, 19, 20, 24
Treasury Regulations 105:
Sec. 81.44 ..... 2, 8, 14, 15
Sec. 81.46 ..... 3, 8, 9, 10, 14, 15, 17, 18, 19, 22, 29, 32

# In the Supreme Court of the United States

OCTOBER TERM, 1954

---

No. 24

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE PETITIONER

---

### OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 2-11) are reported at 18 T. C. 836. The *per curiam* opinion of the Court of Appeals (R. 66) is reported at 207 F. 2d 600.

### JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1953. (R. 67.) The petition for a writ of certiorari was filed February 3, 1954,

and was granted April 5, 1954. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

## STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 812. NET ESTATE.
>
> For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *
>
> (d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *. (26 U.S.C. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.44 *Transfers for public, charitable, religious, etc., uses.*— * * *
>
> If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. Section 81.10 indicates the principles to be applied

in the computation of the present worth of deferred uses, but such computation will not be made by the Commissioner on behalf of the executor. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to the charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. To determine the present value of such remainder, use the appropriate factor in column 3 of Table A or B of section 81.10. If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or in any other manner rendering inapplicable Table A or B of section 81.10, the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in section 81.10, by one skilled in actuarial computations.

* * * * *

SEC. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or

is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

## QUESTION PRESENTED

Whether, for the purpose of determining the net estate for estate tax purposes, the decedent's estate is entitled to a deduction under Section 812(d) of the Internal Revenue Code for contingent remainders to designated charities which will take effect only if the decedent's daughter, aged 27 at the decedent's death, dies without leaving issue or other descendants surviving her and her mother.

## STATEMENT

The facts found by the Tax Court (R. 4-8) may be summarized as follows:

Louis Sternberger, the decedent, died on June 25, 1947. The executors of his estate filed a federal estate tax return disclosing a gross estate of $2,-

406,541.71. The gross estate consisted of certain assets which the decedent owned at the date of his death and other assets held in a revocable trust he had created on January 20, 1931, of which he was the primary life beneficiary. As of the date of the decedent's death, the dispositive provisions of the *inter vivos* trust (after a specific bequest of $5,000) were in all respects identical with the dispositive provisions of the residuary clause of the decedent's will. (R. 5.) In the estate tax return, the executors claimed a deduction of $179,154.19 as representing the alleged value of contingent charitable remainders provided for in the decedent's will and in the *inter vivos* trust of January 20, 1931. (R. 4-6.)

The will provided that the decedent's residuary estate is to be held in trust during the lives of the decedent's wife, Eunice E. Sternberger, and his daughter, Eunice P. Sternberger, and the survivor of them and, upon the death of the survivor, the principal is to be paid in equal shares to "the descendants then living" of his daughter, *per stirpes*, and, in the event there are none, one-half to certain collateral relatives of the decedent then living and one-half to certain charitable organizations. In the event no collateral relatives are then living, the entire principal is to be paid to the charitable organizations. (R. 5.)

The decedent's wife survived him and was 62 years of age at the date of his death. The decedent's daughter also survived him and was 27 years of age at the date of his death. She had been previously married and was divorced on March 31, 1944. At

the date of the decedent's death, she was unmarried and had had no children. (R. 6.)

At the Tax Court hearing, the executors of the decedent's estate introduced actuarial evidence designed to show the value of the contingent charitable remainders as of the decedent's death. This evidence consisted of computations based upon (1) the joint life expectancy of the decedent's wife and daughter, as determined from mortality tables, (2) the probability of the daughter's remarrying, as determined from the American Remarriage Table published by the Casualty Actuary Society, and (3) the probability of a child being born to the decedent's daughter, as determined from a table prepared by one of the testifying actuaries in accordance with accepted actuarial principles based upon data taken from the 1940 census. In making the computations, it was assumed that, if the decedent's daughter married and became the mother of a child, the child would survive her. It was also assumed that there would be someone in the group of collateral relatives who would be living at the deaths of the decedent's wife and daughter, so that not more than 50 per cent of the principal of the trusts would pass to the named charitable organizations. The computations resulted in a figure of $.24094 per dollar of trust corpus based on legitimate descendants of the daughter and of $.24058 including illegitimate children. (R. 6-8.)

The Tax Court held that the decedent's estate was entitled to a deduction under Section 812(d) of the Internal Revenue Code for the contingent

remainders to charity. The decision was based, first, upon an assumption that Section 812(d) allows a deduction for contingent remainders and, secondly, upon an acceptance of the actuarial computation of $.24058 per dollar of trust corpus as a reliable estimate of the value of the contingent remainders as of the decedent's death. (R. 8-11.) The Court of Appeals affirmed the Tax Court "on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2)." (R. 66.)

## SUMMARY OF ARGUMENT

The decision below, which holds that the contingent charitable remainders created by the decedent are deductible under Section 812(d) of the Internal Revenue Code, is contrary to the pertinent Treasury Regulations, which are valid, and is inconsistent with prior interpretations of the Internal Revenue Code. The deduction was apparently allowed by the court below on the theory that Section 812(d) allows a deduction for contingent charitable transfers which can be valued as of the decedent's death, whereas it has previously been held that the deduction is not allowable for any charitable bequest which is contingent as of the decedent's death. The court below apparently confused the rule denying a deduction for a vested charitable remainder where the value of the interest is too indefinite for reliable appraisal with the companion, and sometimes overlapping, rule that there may be no deduction for a contingent gift whether it is subject to accurate valuation or

not. In short, a bequest of a future interest to a charity is not deductible simply because it can be valued; it must also be shown that the possibility that charity will not ultimately take is so remote as to be negligible.

1. Section 812(d) of the Code provides that there shall be deducted from the gross estate "the amount of all bequests * * * to * * * any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes." This provision is implemented by Section 81.44 of Treasury Regulations 105 providing for allowance of a deduction of the value, at the decedent's death, of a charitable remainder under a trust created for both a charitable and private purpose, as when a charitable bequest is preceded by a life estate. In contrast, the first paragraph of Section 81.46, entitled "Conditional bequests", provides that no deduction is allowable for a bequest which is conditional as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible. Section 81.46 of Treasury Regulations 105 was promulgated in 1942. Prior to 1942 the substance of both that section and Section 81.44 had been contained in all of the Treasury Regulations since 1919. The denial of a deduction for conditional bequests is reasonable and consistent with Section 812(d) of the Code, which in terms uses language of outright transfer in allowing the deduction of "The amount of all bequests * * *" to and for charitable uses.

The first paragraph of Section 81.46 of Treasury

Regulations 105 is therefore valid and to be given controlling effect. Indeed, its validity appears to have been already established by *Merchants Bank* v. *Commissioner*, 320 U. S. 256, where this Court approved the distinction drawn in the Regulations between a testator who dilutes his philanthropy by a partial distribution to non-charitable purposes and one who hedges his philanthropy by conditioning the gift. In that case the Court upheld the validity of, and applied, the second paragraph of the prior regulation, comparable to the one here involved, entitled "Conditional bequests", under which deduction, in the case of a gift of property or of a fund which is subject to diversion to a private use, is limited to the portion, if any, of the property or fund which is exempt from an exercise of the power. The validity of the first paragraph of Section 81.46 of Treasury Regulations 105 was specifically upheld by the First Circuit in *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175. In other cases the regulation has been applied on the assumption that it is valid.

The court below, in effect, held the first paragraph of Section 81.46 of Treasury Regulations 105 to be invalid on the authority of its earlier decision in *Meierhof* v. *Higgins*, 129 F. 2d 1002. In that case the court below refused to apply the prior regulation entitled "Conditional bequests" on the ground that it should be read together with the regulation relating to bequests for both a charitable and private purpose, which the court interpreted as allowing deduction for a conditional be-

quest. This Court's *Merchants Bank* decision reflects the incorrectness of such an interpretation of the Regulations.

The first paragraph of Section 81.46 of Treasury Regulations 105 clearly precludes deduction for the contingent charitable bequests here involved. The designated charities' right to take was contingent upon the failure of the decedent's daughter (aged 27 at the decedent's death) to leave issue or other descendants surviving her and her mother. Even according to the actuarial computation submitted in evidence, which resulted in a percentage figure as to the charities' chances of taking, the odds were three-to-one that the charities would not take. This is plainly not a case where the possibility that charity will not take is so remote as to be negligible.

2. The decision below is contrary to the consistent holding that deduction is not allowed for contingent bequests. In early pertinent decisions this Court indicated that the deductibility of charitable bequests depends upon the certainty of receipt by the charity, and *Merchants Bank* implicitly held that the deduction may not be allowed for a contingent bequest, regardless of whether it can be valued as of the decedent's death. On the basis of those decisions, the lower courts have repeatedly denied a deduction for conditional charitable bequests on the ground that Section 812 (d) of the Code and its predecessors allow a deduction only for charitable bequests under which the charity is certain to take. *Meierhof* and one district court de-

cision are exceptions, but the allowance of the deduction in *Meierhof* was even contrary to the statement in a prior decision of the same court, the court below, that no deduction is allowed for a charitable bequest which at the time of the decedent's death is contingent and uncertain ever to take effect.

3. Even if the deductibility of contingent charitable bequests depended upon whether the market value of the bequest could be ascertained as of the decedent's death, as the court below held in *Meierhof*, it would still be clear that no deduction is allowable for the instant contingent remainders. The actuarial computation accepted by the Tax Court and the court below, being based on probabilities built on probabilities, represented merely an arbitrary guess as to the charities' chances of taking. This Court long ago held in *Humes* v. *United States*, 276 U. S. 487, that an actuarial computation representing only a guess as to the value of a charitable remainder does not afford a basis for a charitable bequest deduction.

## ARGUMENT

### The Decedent's Estate Is Not Entitled to a Deduction Under Section 812(d) of the Internal Revenue Code For the Contingent Charitable Remainders

For the purpose of computing a decedent's net estate for estate tax purposes, Section 812(d) of the Internal Revenue Code, *supra*, p. 2, allows a deduction for the amount of charitable bequests, legacies, devises, or transfers. In the present case

the decedent, in a revocable *inter vivos* trust and in a trust created by his will, provided for *contingent* remainders to designated charities (which will be referred to as bequests) under which the charities will take one-half of the trust principal only if the decedent's daughter (aged 27 at the decedent's death) dies without leaving issue or other descendants surviving her and her mother.[1] The Tax Court's holding that the estate is entitled to a deduction under Section 812(d) for such contingent remainders was based upon an assumption that *contingent* bequests are deductible and on an acceptance of an actuarial computation as a reliable estimate of the value of the contingent remainders as of the decedent's death. (R. 8-11.) The Court of Appeals affirmed the Tax Court in a *per curiam* opinion "on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2)" (R. 66), a decision of the same court upholding deduction of the actuarial value of a contingent remainder to Columbia University which would be defeated altogether if the decedent's widow survived the decedent's sister and the sister's husband. By reference to *Meierhof*, it appears that the decision be-

---

[1] The trusts also provided for contingent remainders to the charities as to the other half of the trust principal, contingent not only upon the failure of the decedent's daughter to leave issue or other descendants surviving her and her mother but on the failure of certain collateral relatives of the decedent to survive the daughter and mother. Taxpayer has in effect conceded that no deduction is allowable in respect of this half of the contingent charitable remainders. See footnote 27, *infra*, p. 37.

low was based on the theory that deduction is allowable for a contingent remainder, equally with any other future interest, if "it has an ascertainable market value" (p. 1006). In contrast with this holding, the pertinent Treasury Regulations and decisions other than *Meierhof* deny a deduction with respect to *any* bequest which is contingent as of the decedent's death.[2]

A. *The charitable remainders, being contingent, are not deductible under the pertinent Treasury Regulations.*

1. *The first paragraph of Section 81.46 of Treasury Regulations 105 validly provides that no deduction is allowable for a transfer to charity which is conditional as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible.*

In *Merchants Bank* v. *Commissioner*, 320 U. S. 256, where a charitable bequest deduction was de-

[2] The Commissioner's deficiency determination was based on the ground that "their [the bequests'] actual present value cannot be determined by any known data" (R. 4). In the Court of Appeals the government's principal argument was that no deduction is allowable for gifts to charity which are contingent. Since the burden was on the taxpayer to sustain the validity of the deductions on all grounds, the court of appeals was free to consider the argument before it even though it had not been presented to the Tax Court in that form. *Hormel* v. *Helvering*, 312 U. S. 552; *Helvering* v. *Richter*, 312 U. S. 561. The court below apparently considered the government's position on its merits since the *per curiam* decision does not indicate the contrary.

nied in respect of a charitable remainder of a trust corpus which was subject to invasion in favor of the life tenant, the Court had occasion to refer to the predecessor of Section 812 (d) of the Code which used the same language as the present section and to the Regulations which preceded those involved in the present case. The Court there recognized (p. 259) that in the statute, under which the deduction is in terms allowed for the "amount" of all charitable bequests, Congress used "the language of outright transfer" but—

> apparently envisaged deductions in some circumstances where contingencies, not resolved at the testator's death, create the possibility that only a calculable portion of the bequest may reach ultimately its charitable destination.

for example, "the not unusual case of a bequest of income for life intervening between the testator and the charity" (*ibid.*, fn. 6). As the Court further stated in *Merchants Bank* (pp. 259-260)—

> The Treasury has long accommodated the administration of the section to the narrow leeway thus allowed to charitable donors who wish to combine some private benefaction with their charitable gifts. The limit of permissible contingencies has been blocked out in a more convenient administrative form in Treasury Regulations * * *.

Those limitations are now contained in Sections 81.44 and 81.46 of Treasury Regulations 105, *supra*,

pp. 2-4. Section 81.44, the substance of which has been contained in all of the estate tax Regulations since 1919,[3] relates to the creation of a trust "for both a charitable and a private purpose" and permits deduction of the actuarial value of the beneficial interest in favor of the charitable purpose but—

> only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to the charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. * * *

Section 81.46 of Treasury Regulations 105 is entitled "Conditional bequests" and was preceded by Regulations which from 1921 to 1942 contained the following identical language, except that one of the Regulations commences with the word "If":[4]

---

[3] See Article 53 of Treasury Regulations 37 (Revised, 1919 ed.), promulgated under the Revenue Act of 1918; Article 48, Treasury Regulations 63, promulgated under the Revenue Act of 1921; Article 45, Treasury Regulations 68, promulgated under the Revenue Act of 1924; Article 44, Treasury Regulations 70 (1926 and 1929 eds.), promulgated under the Revenue Act of 1926; and Article 44, Treasury Regulations 80 (1934 and 1937 eds.), promulgated under the Revenue Acts of 1926 and 1932.

[4] See Article 56, Treasury Regulations 63, and Article 47 of Treasury Regulations 68, 70 (1926 and 1929 eds.), and 80 (1934 and 1937 eds.).

The earlier Regulations, Article 56 of Treasury Regulations 37 (Revised, 1919, and Revised January, 1921 eds.), promul-

*Conditional bequests.*—Where the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

In 1942, the first paragraph of the regulation covering "Conditional bequests" was changed to its present form in Section 81.46 of Treasury Regulations 105, which is as follows:[5]

---

gated under the Revenue Act of 1918, contained a provision "Conditional bequests" which was similar to the first paragraph of the above Regulations but did not contain the second paragraph.

[5] The change in this paragraph, making allowance for a case in which the possibility of charity not taking is so remote as to be negligible, was apparently made in recognition of cases (see, e.g., *United States* v. *Provident Trust Co.*, 291 U. S. 272; *Farrington* v. *Commissioner*, 30 F. 2d 915 (C. A. 1st), certiorari denied, 279 U. S. 873; *Ninth Bank & Trust Co.* v. *United States*, 15 F. Supp. 951 (E. D. Pa.)) involving charitable bequests contingent upon the death of a life tenant without issue where, because of the age of the life tenant at the

> Sec. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

Under the Regulations, therefore, deductibility in the case of charitable remainders is based on certainty of receipt by the charity and, as this Court stated in *Merchants Bank* (p. 261), on a highly reliable appraisal "of the amount the charity will receive." On the one hand, the Regulations allow the deduction for the value at the decedent's death of the amount the charity is unconditionally entitled to receive in the future, if its value can be ascertained. On the other hand, the Regulations provide, in clear and unmistakable language, that no deduction is allowable for any bequest which is conditional as of the decedent's death. Thus, if at the time of

---

time of the decedent's death, a prior operation, or medical testimony relating to the life tenant's physical condition as of the decedent's death, the possibility of her having issue was practically non-existent.

the decedent's death it is not certain that charity will receive anything, as under a contingent remainder, the deduction is not allowed and it is immaterial whether the contingent charitable interest as such can be valued as of the decedent's death.

The first paragraph of Section 81.46 of Treasury Regulations 105, directly involved here, is clearly valid. That paragraph, which has been in effect since 1942, states that the deduction is not allowable for a bequest which is conditional as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible. The interpretation of Section 812 (d) of the Code and its predecessors in the Regulations as not permitting the deduction of conditional bequests dates back to 1921, as we have already shown, *supra*, p. 15. The present statutory language, in terms allowing the deduction for "The amount of all bequests * * *" to and for charitable uses, is the original statutory language used by Congress when it first authorized deduction of charitable bequests in Section 403 (a)(3) of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Since the quoted statutory language has been repeatedly reenacted by Congress with presumed knowledge of the interpretation given that language by the Regulations, the Regulations may be deemed to have received the implied approval of Congress and to have the force and effect of law. *Helvering* v. *Winmill*, 305 U. S. 79; *Taft* v. *Commissioner*, 304 U. S. 351; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459. In any event, as was stated in *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501:

> This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons. See, e.g., *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378.

Since Section 812 (d) of the Code uses "the language of outright transfer" (*Merchants Bank*, p. 259) in allowing the deduction of bequests for charitable uses, the regulation's interpretation of the statute as not permitting the deduction of conditional bequests is reasonable and consistent with the statute and should therefore be sustained.

Indeed, the validity of the first paragraph of Section 81.46 of Treasury Regulations 105 appears already to have been established by *Merchants Bank*. That case involved the question whether a deduction was allowable in respect of a charitable remainder of trust corpus which was subject to invasion for the comfort, support, maintenance, and or happiness of the decedent's wife, the life tenant. Because of the power of invasion, the case specifically involved the *second* paragraph of Article 47 of Treasury Regulations 80, promulgated under the Revenue Acts of 1926 and 1932, the article covering "Conditional bequests" (identical with the second paragraph of the present Section 81.46 of Treasury Regulations 105, quoted *supra*, p. 4). That second paragraph provided that in

the case of a gift of property or of a fund which is subject to diversion to a private use, the deduction is limited to the portion, if any, of the property or fund which is exempt from an exercise of the power. Thus, in line with the first paragraph, this second paragraph of Article 47 drew a distinction between the conditional and unconditional parts of a charitable bequest and provided for disallowance of the deduction to the extent the charitable bequest was conditional. In its decision this Court stated that under the statute a "narrow leeway" is allowed to charitable donors who wish to combine some private benefaction with their charitable gifts, that "The limit of permissible contingencies has been blocked out" in convenient administrative form in the Regulations, and that (p. 260)—

> These Regulations are appropriate implementations of § 303 (a)(3) [now Section 812 (d) of the Code], and, having been in effect under successive reenactments of that provision, define the framework of the inquiry in cases of this sort. Cf. *Helvering* v. *Winmill*, 305 U. S. 79; *Toft* v. *Commissioner*, 304 U. S. 351.

The Court expressly approved of the distinction drawn in the Regulations between a testator "who dilutes his charity only to the extent of first affording specific private legatees the usufruct of his property for a fixed period" and a testator who "hedges his philanthropy" and permits invasion of the corpus for private legatees. (P. 260.) The Court also interpreted and applied the Regulations as requiring that for a deduction a highly reliable

appraisal of "the amount the charity will receive" must be available and made at the death of the testator. (P. 261.) Denial of the deduction followed from the fact that the power of invasion, not being limited by reference to readily ascertainable and reliably predictable facts, extended to the entire trust corpus, as distinguished from only a calculable part of it, and made it impossible to compute "what the charity will receive" (p. 262), with the result that the charitable gift was completely conditional.

*Henslee* v. *Union Planters Bank*, 335 U. S. 595, which involved the second paragraph of Section 81.46 of Treasury Regulations 105 (the regulation here in issue) and, like *Merchants Bank*, the question whether a charitable bequest deduction was allowable in respect of a charitable remainder of trust corpus subject to invasion for a private purpose, points up the fact that it is the conditional nature of the charitable bequest which precludes deduction. In its decision the Court specifically stated (p. 599) that the "chance" of invasion—a "contingency which would have diminished or destroyed the charitable interest"—precluded the deduction.

*Merchants Bank* (as well as *Union Planters Bank*) thus accepted and applied the theory, as reflected in the Regulations, that no deduction is allowable under Section 812 (d) for a bequest which is conditional as of the decedent's death. Acceptance of that theory in connection with the application of the *second* paragraph of the regulation entitled "Conditional bequests" is strong support for

the validity of the *first* paragraph of the present regulation. (Section 81.46 of Treasury Regulations 105).

In the cases in which the courts have had occasion to consider the first paragraph of Section 81.46 of Treasury Regulations 105, the regulation has been either held, or assumed to be, valid. It was specifically held to be valid and applied by the First Circuit in *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175. It was assumed to be valid and applied in *Graff* v. *Smith*, 100 F. Supp. 42 (E. D. Pa.), and in *Churchill* v. *United States*, 68 F. Supp. 267 (E. D. Wis.). It was also assumed to be valid by the Fifth Circuit in *Allen* v. *First Nat. Bank of Atlanta*, 169 F. 2d 221, but held to be inapplicable to the facts of that case.

*Newton Trust Co.*, in which the regulation was specifically held to be valid, involved a bequest of a charitable remainder of trust corpus subject to a power of invasion in favor of the decedent's widow. After holding that *Merchants Bank* was applicable because the power of invasion was not limited by any fixed standard and thus did not lend itself to a reliable determination of the amount the charity would ultimately receive, the First Circuit discussed the further argument of the taxpayer that a charitable bequest deduction was allowable on the ground that the power of invasion, because of the terms of the trust under which the property was held, could not be exercised in favor of the decedent's widow until the death of the decedent's brother. The taxpayer argued

that, assuming the death of the decedent's brother prior to the decedent's widow would defeat the deductibility of the charitable interest since it would bring into effect the power of invasion, the charity would take the entire corpus if the widow predeceased the brother. The taxpayer suggested that the point in issue could be stated as "a trust to pay the income to A for life and upon the death of A remainder to B, if B survives A, and if B does not survive A then over to charity" (p. 180) and that the value of this contingent remainder could be valued actuarially on the basis of a 50 per cent factor resulting from the use of mortality tables. In answering the argument (pp. 180-182), the First Circuit stated that it had no hesitation in saying that the value of the contingent charitable bequest may be mathematically or actuarially computed, but that under Section 81.46 of Treasury Regulations 105 no deduction is allowable for the contingent bequest and "We * * * find no reason for denying the validity of the Regulation" (p. 182).

The court below, in effect, held the first paragraph of Section 81.46 of Treasury Regulation 105 to be invalid on authority of its own prior decision in *Meierhof* v. *Higgins*, 129 F. 2d 1002, and gave no recognition to the Government's argument that *Meierhof* was inconsistent with this Court's more recent decision in the *Merchants Bank* case. In *Meierhof* the court below allowed deduction of the actuarial value of a contingent remainder to Columbia University which would be defeated alto-

gether if the decedent's widow survived the decedent's sister and the sister's husband.[6] That case involved the same Regulations (Articles 44 and 47 of Treasury Regulations 80) later dealt with in *Merchants Bank*. Those Regulations, as we have already indicated, were in substance the same as the present Sections 81.44 and 81.46 of Treasury Regulations 105.[7] Instead of applying Article 47 of Treasury Regulations 80 in *Meierhof*, the court below stated that contingent remainders like the one to Columbia University have long been valued for purposes of taxation (p. 1004) and that Article 47 should be read in connection with Article 44, which related to trusts created for both a charitable and a private purpose (p. 1005). In answer to the Government's argument that Article 44 applied to a trust for both a charitable and private purpose while Meierhof's will created a trust in the alternative, the court stated that it saw no reason for construing the words "for both charitable

---

[6] As to one-half of the trust corpus, the charitable remainder was contingent upon the failure of the decedent's widow to survive the decedent's sister; as to the other half, the charitable remainder was conditional on the failure of the decedent's widow to survive both the decedent's sister and the sister's husband.

[7] The first paragraph of Article 47 differed slightly from the present Section 81.46 of Treasury Regulations 105, reading as follows:

> Art. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

and private purposes" as precluding the deduction of conditional trust bequests. (P. 1005).[8] *Merchants Bank* plainly reflects that such a construction of the Regulations is erroneous, for in that case the Court indicated (p. 260) that Article 44 of Treasury Regulations 80 (and thus the present Section 81.44 of Treasury Regulations 105) applies only to—

> the bequest of the testator who dilutes his charity only to the extent of first affording specific private legatees the usufruct of his property for a fixed period, * * *.

and stated that "a different problem is presented" by the testator who "hedges his philanthropy" (p. 260). While both *Meierhof* and the present case involve the application of comparable regulations to contingent charitable gifts, the opinion of this Court in *Merchants Bank* required an overruling of the earlier case.

2. *The first paragraph of Section 81.46 of Treasury Regulations 105 does not permit a deduction in this case*

Under the first paragraph of Section 81.46 of Treasury Regulations 105 no deduction is allowable for a charitable bequest which is conditional

[8] The holding that the deduction was allowable for a conditional bequest was contrary to the overwhelming weight of authority, including prior decisions of the court below, as we show later. In *Newton Trust Co. v. Commissioner*, *supra*, the First Circuit expressly refused (pp. 181-182) to follow the *Meierhof* interpretation of the Regulations.

as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible.[9] The present case involves contingent charitable remainders under which the designated charities will take only if the decedent's daughter dies without leaving issue or other descendants surviving her and her mother. The daughter was 27 years of age at the decedent's death. She was then unmarried but had previously been married and divorced without issue. A woman 27 years of age, in good health, and capable of childbearing is obviously likely to have issue and other descendants who survive her and her mother. Even the actuarial computation accepted by the Tax Court and the court below estimated the value of the contingent remainders as being only $.24058 per dollar of corpus. The actuarial computation, being based on life expectancy, remarriage probabilities, and the chances of issue, was, as the Tax Court recognized (R. 8), only an *estimate* of value. It was the type of valuation urged in the *Newton Trust Co.* case—"a percentage figure" (R. 26) representing the charities' chances of taking all or nothing, not the present value of what they were certain to receive—and reflected that there was a three-to-one

---

[9] As already indicated (fn. 5, supra, p. 16), it appears that the provision for allowance of the deduction in the case of a conditional bequest under which the possibility of charity not taking is so remote as to be negligible was apparently in recognition of decisions, including a decision of this Court (*United States* v. *Provident Trust Co.*, 291 U. S. 272), in which the deduction was allowed for a contingent charitable bequest where the contingency was as a practical matter non-existent

possibility that the charities would *not* take. That of course was not a "negligible" possibility. It therefore follows that the Regulations preclude a deduction in respect of the contingent remainders to charity and that the decision below is incorrect.

B. *Apart from the regulations now applicable, the decisions hold that contingent charitable bequests are not deductible.*

The decision below, allowing a deduction under Section 812 (d) of the Code for conditional charitable transfers, is contrary to the overwhelming weight of authority. Even aside from the validity and applicability of the first paragraph of Section 81.46 of Treasury Regulations 105, the lower courts, on the basis of decisions of this Court, have for the most part never considered conditional bequests to be deductible, regardless of whether in a given case the contingent interest as such could be valued as of the decedent's death.

Three cases involving the deductibility of conditional charitable bequests were decided by this Court prior to *Merchants Bank*. In *Humes v. United States*, 276 U. S. 487, deduction was denied in respect of a contingent charitable bequest under which charities would take trust remainders if the decedent's niece (15 years of age and unmarried at the decedent's death) should die without issue before attaining the age of 40. It was there contended that the actual value of the contingent remainders at the decedent's death could be computed from certain data, but the Court stated that a computation

of value on the basis of such data was "mere speculation bearing the delusive appearance of accuracy" and that the fundamental question was "not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute". (P. 494.) On the record in that case the deduction could have been denied either on the ground that the bequest was not subject to valuation or on the ground of contingency. However, in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, which involved charitable remainders of trust corpus subject to invasion for a private purpose, *Humes* was cited in support of a statement that the question was whether the provision for invasion of the trust corpus made the gifts to charity "so uncertain" that deduction of the "amount of those gifts" could not be allowed. (P. 154.) In *Ithaca Trust Co.* it was held that a deduction was allowable because the bequest was not conditional to the extent of a calculable part of the trust corpus which under the terms of the gift was free from the danger of invasion.[10] *United States* v. *Provident Trust Co.*, 291 U. S. 272, involved deductibility in respect of a contingent remainder under which charities would take if the decedent's daughter died without issue. At the decedent's death the daughter was 50 years of age, had no issue, and had had an operation which rendered her incapable of giving birth to a child. De-

[10]A comparable situation is similarly treated in a recent ruling of the Internal Revenue Service. Rev. Rul. 54-285, Int. Rev. Bul. July 19, 1954, p. 5.

duction for the remainder interest was allowed because (p. 286)—

> the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem.

In other words, the charitable bequest was contingent only in form, not in practical effect.[11]

The Court's more recent *Merchants Bank* and *Union Planters Bank* decisions made it even clearer that denial of the deduction for conditional charitable bequests results from the conditional nature of the bequests, not from inability to value the contingent charitable interest as such. In both of those cases the charitable remainders of trust corpus were conditional in the sense that charity would receive only that trust corpus not diverted to the use of the life tenant through a power to invade the corpus. In *Merchants Bank* the Court stated (p. 261) that deductibility must rest on a highly reliable appraisal "of the amount the charity *will* receive" (emphasis added). In *Union Planters Bank*, where the charitable remainder of trust corpus was subject to invasion in favor of the decedent's mother, the Court stated (pp. 599-600):

> We do not overlook the unlikelihood that a woman of the mother's age and circumstances

[11] Section 81.46 of Treasury Regulations 105 makes allowance for the deduction in such a case by providing that conditional charitable bequests are not deductible "unless the possibility that charity will not take is so remote as to be negligible."

> would abandon her customary frugality and squander her son's wealth. But, though there may have been little chance of that extravagance which would waste a part or consume the whole of the charitable interest, that chance remained. * * * The contingency which would have diminished or destroyed the charitable interest here considered might well have been insured against, but such an arithmetic generalization of experience would not have made this charitable interest "presently ascertainable" [quoting from *Humes* v. *United States*, 276 U. S. 487, 494]. "Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient." *Merchants Bank* v. *Commissioner, supra* at 261.

Thus, these decisions clearly hold that the deduction is allowed only for the value at the decedent's death (usually called "present value") of the amount charity *will* receive and that it is immaterial whether the charity's contingent possibility of receipt can be valued as of the decedent's death.[12]

Applying the decisions of this Court, the lower

[12] It may be noted that in the *Merchants Bank* and *Union Planters Bank* cases it was quite likely that the charities would receive at least some amount, whereas in the present case, where the charities' right to receive anything was contingent upon the failure of a woman 27 years of age to leave issue or other descendants surviving her and her mother, there was a three-to-one chance against the charities' taking anything (see *supra*, pp. 6-7) and a determination of whether the charities would *actually* take was "as far beyond the reach of an

courts, including both the court below and the Tax Court until their decisions in the present case, have repeatedly held that conditional charitable bequests are not deductible under Section 812 (d) of the Code and its predecessors.[12] See *Newton Trust Co.* v. *Commissioner*, *supra*; *Burdick* v. *Commissioner*, 117 F. 2d 972 (C. A. 2d), certiorari denied, 314 U. S. 631; *Davison* v. *Commissioner*, 81 F. 2d 16 (C. A. 2d); *Helvering* v. *Union Trust Co.*, 125 F. 2d 401 (C. A. 4th), certiorari denied, 316 U. S. 696; *Norris* v. *Commissioner*, 134 F. 2d 796 (C. A. 7th), certiorari denied, 320 U. S. 756; *Knoernschild* v. *Commissioner*, 97 F. 2d 213 (C. A. 7th); *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 (C. A. 8th); *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197 (C. A. 8th), certiorari denied, 293 U. S. 604; *Graff* v. *Smith*, 100 F. Supp. 42 (E. D. Pa.); *Churchill* v. *United States*, 68 F. Supp. 267 (E. D. Wis.); *Hoagland* v. *Kavanagh*, 36 F. Supp. 875 (E. D. Mich.); *Wood* v. *United States*, 20 F. Supp. 197 (W. D. Ark.); *City Bank Farmers' Trust Co.* v. *United States*, 5 F. Supp. 871 (S. D. N. Y.), affirmed on

---

educated guess as what will be the first name of the man or woman who will become President of the United States in 1983". *Baker* v. *Commissioner*, 205 F. 2d 369, 370 (C. A. 2d).

[12] In addition to the cited cases, there are also cases involving charitable bequests of trust corpus subject to invasion for a private purpose in which the decisions, both before and after *Merchants Bank*, were based on the ground that the amount that would ultimately go to charity was uncertain. See, e. g., *Gammons* v. *Hassett*, 121 F. 2d 229, 233 (C. A. 1st), certiorari denied, 314 U. S. 673; *National Bank of Commerce of San Antonio* v. *Scofield*, 169 F. 2d 145 (C. A. 5th), certiorari denied, 335 U. S. 907.

other grounds, 74 F. 2d 692 (C. A. 2d); *Delaware Trust Co.* v. *Handy*, 53 F. 2d 1042 (D. Del.); *Gaston Estate* v. *Commissioner*, 2 T. C. 672; cf. *Allen* v. *First Nat. Bank of Atlanta*, 169 F. 2d 221 (C. A. 5th). With the exceptions noted hereinafter, the rule appears to have been uniformly applied except in cases involving a situation similar to *United States* v. *Provident Trust Co.*, 291 U. S. 272; that is, where the condition attached to the bequest did not exist as a practical matter as of the time of the decedent's death and the possibility of charity not taking was thus so remote as to be negligible.[14] See *Allen* v. *First Nat. Bank of Atlanta*, *supra*; *City Bank Farmers' Trust Co.* v. *United States*, *supra*; *Ninth Bank & Trust Co.* v. *United States*, 15 F. Supp. 951 (E. D. Pa.).

The basis of these decisions that conditional charitable bequests are not deductible was not that the conditional bequests could not be valued as of the decedent's death, the basis on which taxpayer has attempted to distinguish such cases (Brief in oppo-

[14] In *Farrington* v. *Commissioner*, 30 F. 2d 915 (C. A. 1st), certiorari denied, 279 U. S. 873, deduction was *denied* by a divided court in a case where the charitable bequest was contingent upon the death without issue of the decedent's daughter, who was 52 years of age at the time of the decedent's death, had never borne a child, and, according to medical testimony, was incapable of bearing a child. That decision is no longer authoritative in view of this Court's decision in *United States* v. *Provident Trust Co.*, *supra*, and the exception in the first paragraph of Section 81.46 of Treasury Regulations 105 allowing the deduction for a conditional bequest under which the possibility that charity will not take is so remote as to be negligible.

sition p. 7), but that no deduction is allowed for a charitable bequest under which it is uncertain at the decedent's death that the charities will ever receive anything. The most recent decisions are based upon the first paragraph of Section 81.46 of Treasury Regulations 105, already discussed.[15] The other decisions state the applicable law to be that a "condition precedent" to the deduction "is that there shall be in substance an absolute testamentary gift" and "When the bequest, though charitable, is at the time of death contingent and uncertain ever to take effect no deduction may be allowed";[16] that a charitable bequest is not deductible "unless the bequest is unconditionally made and the amount is definitely ascertainable at the death of the decedent";[17] that in order to justify a deduction it must appear that, at the date of the testator's death, the gift to charity "was definite and certain and not dependent upon any contingency";[18] that any gift, in order to be deductible, "must be one which is final, absolute, unconditional and irrevocable";[19] that "A contingent bequest, that is, one depending upon the happening of some event which may never take place, is not deductible";[20] that to be de-

[15] *Newton Trust Co.* v. *Commissioner, supra; Graff* v. *Smith, supra; Churchill* v. *United States, supra; cf. Allen* v. *First Nat. Bank of Atlanta, supra.*

[16] *Burdick* v. *Commissioner, supra*, p. 974; see also *Delaware Trust Co.* v. *Handy, supra.*

[17] *Helvering* v. *Union Trust Co., supra*, p. 403.

[18] *Hoagland* v. *Kavanagh, supra*, p. 877.

[19] *Knoeruschild* v. *Commissioner, supra*, p. 214; see also *Norris* v. *Commissioner supra.*

[20] *Gaston Estate* v. *Commissioner, supra*, p. 675.

ductible a charitable bequest must be "reasonably certain at the time of the testator's death", as distinguished from contingent and wholly uncertain;[21] that the test of deductibility is whether the bequest "is reasonably certain, under the circumstances prevailing at the testator's death, to vest in possession and enjoyment";[22] and that where "there is no mandatory requirement that anything shall pass from the estate to any charitable institution" the bequest lacks the "legal certainty or reality" necessary to entitle it to tax deductibility [23] because of "an entire uncertainty, at the death of testator, as to whether there would ever be any such charitable donation."[24] In some of these cases it may have been possible to place a present value upon the conditional bequest as such, as in cases involving charitable remainders conditioned upon the failure of an individual to survive a designated age or event or to have issue,[25] but the basis of the decisions obviously includes an implicit holding that, as stated in *Graff* v. *Smith, supra,* p. 43—

> It is immaterial that an actual value may be placed upon the charitable institution's right

---

[21] *Davison* v. *Commissioner supra* p. 17; see also *Wood* v. *United States supra.*

[22] *City Bank Farmers' Trust Co.* v. *United States, supra,* p. 872.

[23] *First Trust Co. of St. Paul State Bank* v. *Reynolds, supra,* p. 521.

[24] *Mississippi Valley Trust Co.* v. *Commissioner, supra,* p. 199.

[25] *See Hoagland* v. *Kavanagh, supra; Wood* v. *United States, supra; Graff* v. *Smith, supra; Gaston Estate* v. *Commissioner, supra.*

> to receive the money or that some one might be willing to purchase such right (i.e. market value) or insure it.

The decisions thus amply support the statement of the Fourth Circuit in *Helvering* v. *Union Trust Co.*, *supra*, p. 403, that "The rule of law" as to conditional bequests "is free from doubt"—that "It is well established" that a charitable bequest is not deductible "unless the bequest is unconditionally made and the amount is definitely ascertainable at the death of the decedent".

*Meierhof* v. *Higgins*, 129 F. 2d 1002 (C. A. 2d), the authority on which the court below relied for its decision in the instant case, and *Gardiner* v. *Hassett*, 63 F. Supp. 853 (D. Mass.), appear to be the only cases in which deduction for a truly contingent bequest has ever been allowed.[26] Allowance of the deduction in *Meierhof* was even contrary to the unequivocal statement of the court below in a prior case (*Burdick* v. *Commissioner*, 117 F. 2d 972, 974, certiorari denied, 314 U. S. 631) that—

> A condition precedent to the coming into effect of a right to deduct is that there shall be in

---

[26] In another old case—*United States* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85 (C. A. 10th), certiorari denied, 299 U. S. 575—it was stated that deduction is allowable for a contingent charitable interest if its value as of the decedent's death can be ascertained by reasonable methods or by recognized data, but deduction for the contingent interest there involved was denied because the value of the contingent interest was too speculative and because the contingency constituted a condition precedent.

> substance an absolute testamentary gift to a corporation of the nature prescribed. When the bequest, though charitable, is at the time of death contingent and uncertain ever to take effect no deduction may be allowed.

Another prior decision of the court below, *Davison v. Commissioner*, 81 F. 2d 16, was to the same effect as *Burdick*.

To follow the holding of the court below in *Meierhof*, that a contingent charitable bequest is deductible if "it has an ascertainable market value" (p. 1006) but not where accurate appraisal is impossible, has no relation to the Congressional purpose to encourage charitable gifts. The chances that a charitable donation will ultimately result may be just as remote in a case where the contingent bequest can be, as when it cannot be, valued as of the decedent's death.

In Section 812 (d) of the Code Congress "used the language of outright transfer" (*Merchants Bank*, p. 259) in providing for the deduction and over the years the statute has been continuously interpreted and applied as allowing the deduction only for bequests which represent unconditional charitable donations. The nondeductibility of conditional charitable bequests is thus a rule of long standing and the decision below, rendered on the authority of *Meierhof*, furnishes no adequate reason for overturning that rule.

C. *The evidence as to the actuarial value of the contingent charitable remainders does not in any event support the deduction.*

If the deductibility of contingent charitable bequests depended upon whether the market value of the bequest could be ascertained as of the decedent's death, as the court below held in *Meierhof*, it would still be clear that no deduction is allowable for the contingent remainders here involved. The actuarial computation accepted by the Tax Court and the court below as the amount of the deduction was no more than a guess as to value.

The charities' contingent interest, so far as here involved, consists of the right to receive one-half the principal of two trusts at the death of the survivor of the decedent's wife and daughter if the daughter (aged 27 at the decedent's death) does not leave issue or other descendants surviving her and her mother.[27] The actuarial computation accepted by the Tax Court and the court below was a computation based upon (1) the joint life ex-

[27] The charities had contingent remainder interests as to the other half of the trust principal contingent not only upon the failure of the daughter to leave issue or other descendants surviving her and her mother but upon the failure of any of certain collateral relatives of the decedent to survive the daughter and her mother. That part of the contingent bequests is excluded from consideration by reason of the fact that the actuarial computation, on the basis of which the court below allowed the deduction, assumed that there would be someone in the group of collateral relatives who would be living at the deaths of the daughter and mother, so that not more than 50 per cent of the trust principal could pass to the named charitable organizations.

pectancy of the decedent's wife and daughter, as determined from mortality tables, (2) the probability of the daughter remarrying, as determined from the American Remarriage Table published by the Casualty Actuary Society, and (3) the probability of a child being born to the decedent's daughter, as determined from a table prepared by one of the testifying actuaries in accordance with accepted actuarial principles based upon data taken from the 1940 census. In making the computation, the actuaries were stymied first of all by the fact (R. 31) that there is no recognized table in the United States covering the probability of a woman 27 years of age having issue, but that obstacle was surmounted by the preparation of the above-mentioned table by one of the actuaries (R. 25). Beyond that, however, the actuaries apparently could not even improvise. In making their computations, they assumed that, if the daughter married and became the mother of a child, the child would survive her. (R. 6-7.) Here, as in *Robinette* v. *Helvering*, 318 U. S. 184, 189, where the factors to be considered in fixing the value of a contingent reversionary interest for gift tax purposes included consideration of whether or not the donor's daughter would marry, whether she would have children, and whether they would reach the age of 21—

> Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial

art could do more than guess at the value here in question.

The actuarial computation as made here, being based upon probabilities built upon probabilities, resulted in "a percentage figure" (R. 26), not even accurate, of the chances of the charities taking. Even the Tax Court termed it only an "estimate" of the value of the contingent remainders. (R. 10.) The record does not show that this "estimate" of value represented actual or market value. As representative of value, the actuarial computation was like the actuarial computation involved in *Humes* v. *United States*, 276 U. S. 487, 494—"mere speculation bearing the delusive appearance of accuracy"—and therefore does not furnish a proper basis for the deduction even if all of the decisions subsequent to *Humes* except *Meierhof* are ignored and *Humes* is interpreted as allowing deduction for a contingent remainder whose actual or market value is ascertainable as of the decedent's death.

## CONCLUSION

The decision below is incorrect and should be reversed.

Respectfully submitted,

SIMON E. SOBELOFF,
*Solicitor General.*
H. BRIAN HOLLAND,
*Assistant Attorney General.*
ELLIS N. SLACK,
ROBERT N. ANDERSON,
MELVA M. GRANEY,
*Special Assistants to the Attorney General.*

AUGUST, 1954.

# INDEX


| | Page |
|---|---|
| Docket Entries | 2 |
| Findings of Fact and Opinion of the Tax Court | 2 |
| Decision | 11 |
| Stipulation of Facts | 12 |
| Exhibit 1 Attached to Stipulation | 15 |
| Exhibit 2 Attached to Stipulation | 19 |
| Transcript of Hearing | 22 |
| Taxpayer's Witnesses: | |
| David Silverman | 22 |
| Richard Fodelier | 36 |
| Taxpayer's Exhibit 3 | 47 |
| Taxpayer's Exhibit 4 | 50 |
| Taxpayer's Exhibit 5 | 51 |
| Taxpayer's Exhibit 6 | 57 |
| Taxpayer's Exhibit 7 | 59 |
| Taxpayer's Exhibit 8 | 60 |

IN THE

# United States Court of Appeals
# For the Second Circuit

---

No.

---

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor
*Respondent*

---

**On Petition for Review of the Decision of the Tax Court of the United States**

---

## APPENDIX TO THE PETITIONER'S BRIEF

[Tr. 1]

Docket No. 31348

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
*Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

APPEARANCES:

For Petitioner: William F. Wolff, Jr., Esq.; Maurice C. Greenbaum, Esq.

For Respondent: Thomas R. Charshee, Esq.; R. C. Whitley, Esq.

**Docket Entries**

*1950*

Nov. 13—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 18—Answer filed by General Counsel.

*1951*

Nov. 15—Hearing had before Judge Black, on merits. Stipulation of facts and exhibits 1 and 2 filed at hearing. Appearance of Maurice C. Greenbaum filed. Briefs due 1/20/52. Replies due 2/10/52.

*1952*

Jul. 31—Findings of fact and opinion rendered, Black, *Judge*. Decision will be entered under rule 50. Copy served.

Dec. 29—Decision entered, Black, *Judge*, Div. 15.

*1953*

Mar. 24—Petition for review by U. S. Court of Appeals, Second Circuit, filed by General Counsel.

Mar. 26—Notice of filing petition for review mailed to William F. Wolff, Jr., attorney, filed by General Counsel.

---

[Tr. 15]

[Caption]

**Findings and Opinion of the Tax Court**

18 T. C. 836

Docket No. 31348. Promulgated July 31, 1952.

1. A contingent remainder of a trust and the residue of a will went to charity, and a charitable deduction

was claimed on the estate tax return. The will disposes of decedent's residuary estate by providing that the same be held in trust during the joint lives of decedent's wife and his daughter and the life of the survivor of them. Upon the death of the survivor the principal is payable to the descendants then living of the daughter. In the event there are no descendants of the daughter the principal is payable one-half to certain collateral relatives of the decedent then living and one-half to certain charitable organizations. In the event none of the collateral relatives are then living the entire principal is payable to said charitable organizations. *Held*, the contingent remainders to charitable organizations can and have been valued by competent actuarial methods and the Commissioner erred in refusing to allow a deduction under section 812(d) of the Code for the value of these contingent remainders to charity.

[Tr. 16]

*William F. Wolff, Jr., Esq.*, and *Maurice C. Greenbaum, Esq.*, for the petitioner.

*Thomas R. Charshee, Esq.*, for the respondent.

The respondent has determined a deficiency in estate tax against the Estate of Louis Sternberger of $195,035.65. The deficiency is due to several adjustments made by the Commissioner to the estate tax return filed by the estate. Only one of these adjustments is contested. The contested adjustment is the disallowance by the Commissioner of $179,154.19, claimed as charitable bequests explained in respondent's deficiency notice as follows:

| *Charitable, etc., Gifts and Bequests:* | *Returned* | *Determined* |
|---|---|---|
| Items 2 to 5 inclusive | $179,154.19 | $0.00 |

Items 2, 3, 4 and 5 claimed as deductions under Schedule N, are disallowed in full since their actual present value cannot be determined by any known data.

The petitioner assigned error as to the foregoing adjustment. It also assigned as error the failure to allow deductions not claimed on the return. Petitioner's two assignments of error still pressed are as follows:

(a) The Commissioner has erroneously disallowed a deduction for Charitable, Public and Similar Gifts and Bequests in the amount of $179,154.19.

---

[Tr. 17]

## Findings of Fact.

Some of the facts have been stipulated and are found accordingly and the stipulation of facts is incorporated herein by reference.

The petitioner is the executor of the last will and testament of Louis Sternberger, deceased. The decedent Louis Sternberger died June 25, 1947, a resident of Scarsdale, New York. The Federal estate tax return was filed on September 24, 1948, with the collector of internal revenue for the 14th district of New York disclosing a gross estate of $2,406,541.71, a net estate for purpose of the basic estate tax of $2,024,346.55 and a net taxable estate for purpose of additional estate tax of $2,064,346.55.

### *Issue 1.*

The gross estate of the decedent for Federal estate tax purposes consisted of certain assets which he owned at the date of his death and certain other assets held in a revocable trust of which the decedent was the settlor

and primary life beneficiary. The revocable trust was created on January 20, 1931, and was amended from time to time by the decedent.

The last will and testament of the decedent is dated July 24, 1944, and the codicil thereto is dated October 20, 1945.

Paragraph FIRST of the codicil to decedent's last will and testament disposes of decedent's residuary estate by providing that the same be held in trust during the joint lives of decedent's wife, Eunice E. Sternberger, and decedent's daughter, Eunice P. Sternberger, and the life of the survivor of them. Upon the death of the survivor the principal is payable:

> to the descendants then living of said Eunice P. Sternberger in equal shares, *per stirpes*.

In the event there are no descendants of the decedent's daughter, Eunice P. Sternberger, surviving the decedent's widow and daughter, the principal is pay-

[Tr. 18]

able, one-half to certain collateral relatives of the decedent then living, and one-half to certain charitable organizations. In the event none of the collateral relatives are then living the entire principal is payable to said charitable organizations.

The dispositive provisions of the *inter vivos* trust, effective at the date of the decedent's death, are (after a specific bequest of $5,000) in all respects identical with the dispositive provisions of the residuary clause of decedent's last will and testament.

In the Federal estate tax return of the decedent a charitable deduction was claimed in the amount of $180,154.19, of which $1,000 represented an outright bequest to the Seamen's Church Institute of New York. The sum of $179,154.19 represented the alleged value

of the contingent charitable remainders provided for in decedent's last will and testament, and in the *inter vivos* trust of January 20, 1931.

The decedent's wife, Eunice E. Sternberger, survived the decedent and was sixty-two years of age at the date of decedent's death. She has always resided in the United States.

The decedent's daughter, Eunice P. Sternberger, survived the decedent and was twenty-seven years of age at the date of decedent's death. She had been previously married, which marriage terminated in divorce on March 31, 1944. At the date of decedent's death she was then unmarried and had had no children. Said daughter is a white female and has always resided in the United States.

The probability of a divorcee remarrying may be measured by established and accepted actuarial principles based upon known and reliable data.

The probability of a white female, age 27, having children may be measured by established and accepted actuarial principles based upon known and reliable data.

[Tr. 19]

The value of a remainder interest contingent upon a person dying without issue may be measured by established and accepted actuarial principles based upon known and reliable data.

The computation of the value of the charitable remainders provided for by decedent's last will and testament, and the *inter vivos* trust of January 20, 1931, was prepared by a recognized firm of actuaries in accordance with established actuarial principles based upon known and reliable data.

In making the computation of the present value of the charitable remainders it was assumed that if the decedent's daughter, Eunice P. Sternberger, married and

became the mother of a child, the child would survive her.

In making the computation of the present value of the charitable remainders it was assumed that there would be someone in the group of collateral relatives who would be living at the date of death of decedent's wife and daughter so that not more than 50 per cent of the principal of the residuary trusts would pass to the named charitable organizations.

The computation of the present value of the charitable remainders by petitioner's actuaries was based upon the following factors:

(a) Joint life expectancy of the decedent's wife and daughter, as determined by the Combined Experience Mortality Table prescribed in Section 81.10 of the Estate Tax Regulations promulgated by the Commissioner of Internal Revenue.

(b) The probability of the remarriage of decedent's daughter, Eunice P. Sternberger, as determined from the American Remarriage Table, published by the Casualty Actuary Society, Volume 19, pages 279-394—which table is accepted as valid for estate tax purposes by the United States Treasury Department.

(c) The probability of a child being born to decedent's daughter, Eunice P. Sternberger, as determined from a table prepared in accordance with accepted actuarial principles based upon known and reliable data derived from the Vital Statistics of the United States, 1940, published by the Bureau of the Census.

[Tr. 20]

The experience data from which the probability of issue being born to decedent's daughter Eunice P.

Sternberger was computed, were compiled by the United States Bureau of the Census in connection with the 1940 Federal Census.

At the date of death of the decedent the present value of the charitable remainders provided in decedent's last will and testament and in the *inter vivos* trust of January 20, 1931, based on legitimate descendants only was $.24094 per dollar of trust corpus.

At the date of death of decedent the present value of the charitable remainders provided in decedent's last will and testament and in the *inter vivos* trust of January 20, 1931, based upon the same actuarial computations and data used in arriving at the values set forth above, except that the term "descendants" was deemed to include illegitimates, was $.24058 per dollar of trust corpus.

The present value of the charitable remainders at the date of death of decedent, assuming that the remarriage of decedent's daughter alone would defeat the charitable remainders, is $.18384 per dollar of trust corpus.

The computation of the present value of the charitable remainders on the assumption stated just above is based upon the same use of the Combined Experience Mortality Table and the American Remarriage Table, without referring to the probability of issue. This computation assumes that if decedent's daughter remarried, the probability of issue would be 100 per cent.

* * * * * * * * *

[Tr. 22]

OPINION

BLACK, *Judge:* There are two isues in this proceeding involving the estate tax. The major question concerns whether a contingent remainder to charity is deductible under section 812(d) of the Code and, if so, the amount of the deduction. * * *

*Issue 1.*

The applicable statute to Issue 1 is printed in the margin.[1] In the instant case there is no issue between the parties that the charities to which the contingent bequests were made are of the class named in section 812(d) of the Code. The only reason that respondent has denied the deduction which petitioner claims for these contingent charitable bequests is that he contends that the present value of decedent's contingent bequests to charity is too speculative and tenuous to be deductible. In support of this contention,

[Tr. 23]

respondent relies upon the Supreme Court's decisions in *Humes* v. *United States*, 276 U. S. 487, and *Robinette* v. *Helvering*, 318 U. S. 184.

Petitioner, on the other hand, contends that it has made clear and convincing proof that actuarial computations can and have been made of the present value of these contingent bequests to charity. Petitioner further

---

[1] INTERNAL REVENUE CODE.

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

(d) Transfers for Public, Charitable, and Religious Uses.—The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return or, in the case of a decedent dying on or before October 21, 1942, if the disclaimer is made prior to September 1, 1944), to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *

contends that such actuarial computations having been made, *Estate of Pompeo M. Maresi*, 6 T. C. 582, affd. 156 F. 2d 929, is applicable and sustains petitioner. Petitioner points out that in the *Maresi* case, both the Tax Court and the Second Circuit distinguished *Humes* v. *United States* and *Robinette* v. *Helvering*, both *supra*, upon which respondent relies, and petitioner contends that substantially the same distinction as existed in the *Maresi* case exists here. We agree with petitioner.

Petitioner presented reliable and conservative actuarial testimony to estimate the value of the contingent remainder to charity at the date of decedent's death to support his deduction of $179,154.19. We do not feel that we are at liberty to disregard this testimony of competent actuaries who have made their computations in accordance with what appear to be well recognized actuarial methods.

In *Estate of Pompeo M. Maresi, supra*, we held that the commuted value of the liability of decedent's estate for payments to decedent's wife until she should die or remarry were deductible from decedent's gross estate in an amount determinable by reference to American Experience Tables reflecting life expectancy and the probability of the remarriage of widows. In that case, among other things, we said:

[Tr. 24]

> And, of course, it can not be said here as in the *Robinette* case that petitioner has referred us to no method for determining the value of the interest in question. Although it is true that a marriage table was offered in the *Humes* case, it appeared to relate solely to experience among women in the Scotch peerage, while the table proffered here is based upon American statistics.

Following the principle which we announced in the *Maresi* case, *supra*, and which was affirmed by the Second Circuit, we hold in petitioner's favor on Issue 1.

In the first computation made by petitioner's actuary he determined that the present value of the charitable remainder under the will of the decedent at date of death was $.24094 per dollar represented in the one-half of the estate which may go to charity. In a supplemental valuation based upon the effect upon the remainder value of the contingency of illegitimate issue the actuary reaches a slightly lower figure. In this supplemental computation the actuary reaches the conclusion that the net result is that the increased probability of issue reduces the value per dollar of remainder to charity from $.24094 to $.24058. This supplemental actuarial computation concludes with this statement: "It is our opinion that the figure of $.24058 does make full provision for the probability of issue, whether or not legitimate." In a recomputation under Rule 50 of the deduction for charitable bequests this figure of $.24058 should be used instead of the figure $.24094.

* * * * * * * * *

[Tr. 25]

*Decision will be entered under Rule 50.*

---

[Tr. 26]

[Caption]

**Decision**

On July 31, 1952, Findings of Fact and Opinion were promulgated in this proceeding. At the conclusion of the opinion it was stated "Decision will be entered under Rule 50." On November 5, 1952, respondent filed his computation for entry of decision. On November 28, 1952, petitioner filed its computation for

entry of decision. These computations differed and were set for hearing in Washington, D. C., December 3, 1952. On that date both pa ties appeared and were heard in support of their respective computations. Their arguments have been fully considered.

Premises considered, it is believed the following decision should be entered:

ORDERED and DECIDED, that there is an overpayment in the estate tax of petitioner in the amount of $91,539.02, of which $24,798.25 was paid within three years before the mailing of the notice of deficiency, which notice was mailed within three years from the filing of the return, and $66,740.77 was paid after the mailing of the notice of deficiency.

(Signed) EUGENE BLACK
*Judge*

Entered Dec. 29, 1952.

[Seal of the Tax Court]

---

[Tr. 27]

[Caption]

**Stipulation of Facts**

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. The petitioner is the Executor of the Last Will and Testament of Louis Sternberger, deceased.

2. The decedent Louis Sternberger died June 25, 1947, a resident of Scarsdale, New York.

3. The Federal estate tax return was filed on September 24, 1948, with the Collector of Internal Revenue for

the 14th District of New York, disclosing a gross estate of $2,406,541.71, a net taxable estate for purposes of the basic estate tax of $2,024,346.55, and a net taxable estate for purposes of the additional estate tax of $2,064,346.55.

4. Decedent owned improved realty known as 2 Oak Lane, Scarsdale, New York, which property was included in the Federal estate tax return at a valuation of $65,000.00. The said realty had a fair market value on the optional valuation date, June 25, 1948, of $55,000.00.

[Tr. 28]

5. The gross estate of the decedent for Federal estate tax purposes consisted of certain assets which he owned at the date of his death and certain other assets held in a revocable trust of which the decedent was the settlor and primary life beneficiary. The revocable trust was created on January 20, 1931, and was amended from time to time by the decedent. The provisions of said trust effective at the death of the decedent are set forth in Exhibit "1" hereto annexed.

6. A copy of the Last Will and Testament of the decedent, dated July 24, 1944, and the codicil thereto, dated October 20, 1945, are annexed hereto as Exhibit "2".

7. In the Federal estate tax return of the decedent a deduction was claimed under section 812(d) of the Internal Revenue Code, in the amount of $180,154.19, of which $1,000.00 represented an outright bequest to Seamen's Church Institute of America. The sum of $179,154.19 represented the alleged value of the contingent charitable remainders referred to in Exhibits "1" and "2".

8. The decedent's wife, Eunice E. Sternberger, survived the decedent and was sixty-two years of age at the date of decedent's death. She has always resided in the United States.

9. The decedent's daughter, Eunice P. Sternberger, survived the decedent, and was twenty-seven years of age at the date of decedent's death. She had been previously married, which marriage terminated in divorce on March 31, 1944. At the date of decedent's death she was then unmarried and had had no children. Said daughter is a white female and has always resided in the United States.

10. The deduction for the amount of additional legal

[Tr. 29]

fees paid or to be paid to Messrs. Greenbaum, Wolff & Ernst by the petitioner for legal services rendered and disbursements shall be determined under Rule 50 of the Rules of Practice of The Tax Court.

11. The New York estate tax return of the decedent was filed with the New York State Tax Commission in Albany, New York, on October 28, 1948, and no final order has been entered in said proceeding. The following New York estate taxes have been paid to the State of New York in respect of property included in the gross estate of the decedent:

| | |
|---|---|
| December 10, 1947 | $154,137.50 |
| February 3, 1948 | 1,920.00 |
| Total | $156,057.50 |

[Signatures omitted]

[Tr. 30]

**Exhibit 1 Attached to Stipulation**

Two Oak Lane
Scarsdale, New York
October 20, 1945

The Chase National Bank of the City of New York
as Trustee under Trust Indenture dated
January 20, 1931, as amended, made by
Louis Sternberger
Eleven Broad Street
New York 15, New York

Gentlemen:

In accordance with the right reserved to the Grantor to revoke, modify or amend the above Trust Indenture, I, the Grantor, do hereby exercise such power as follows:

1. I do hereby revoke in its entirety paragraph "FIRST" of the said Trust Indenture as heretofore amended, and, in lieu thereof, I hereby substitute the following:

"FIRST: The Trustee shall hold the Trust Estate during the life of the Grantor, in trust, to collect the income therefrom and to pay the same to him in monthly payments during his life.

"Upon his death, the Trustee shall transfer and pay over the sum of Five Thousand Dollars ($5,000), free of estate and inheritance taxes or other charges to VINCENT L. BANKER, if he survives the Grantor, as a token of the Grantor's friendship and appreciation of the interest the said VINCENT L. BANKER has taken in the Grantor's affairs during his lifetime, and shall continue to hold the balance of the Trust Estate in trust during the period of the joint lives of the Grantor's wife EUNICE E. STERNBERGER and the Grantor's daugh-

ter EUNICE P. STERNBERGER and the life of the survivor of them, and shall keep the same invested and perform the following acts and things:

*First: as to Income:* The Trustee shall collect the income therefrom and shall pay the net annual income as follows:

a) The Trustee shall pay to the Grantor's wife EUNICE E. STERNBERGER fifty per cent (50%) of such net income during the life of our daughter EUNICE P. STERNBERGER and in the event of the demise of our daughter EUNICE P. STERNBERGER thereafter such sums as hereinafter provided. Said income will be paid during said EUNICE E. STERNBERGER's life in monthly installments.

b) The Trustee shall pay to the Grantor's daughter EUNICE P. STERNBERGER the remaining fifty per cent (50%) of such net income in monthly installments during the life of the grantor's wife EUNICE E. STERNBERGER and in the event of the demise of the said Grantor's wife, shall pay to said EUNICE P. STERNBERGER the entire net income of the trust in monthly installments during her life.

[Tr. 31]

c) If the Grantor's daughter EUNICE P. STERNBERGER shall die before EUNICE E. STERNBERGER, then the Trustee shall pay the entire net income of the trust as follows:

1. Sixty percent (60%) thereof to EUNICE E. STERNBERGER during her life.

2. Forty percent (40%) thereof to EUNICE P. STERNBERGER's descendants in equal shares per stirpes as that class may from time to time be constituted, and at such time as no person in such class shall then survive then

to pay said income to my niece BLANCHE R. WOLFF and my grandnephews WILLIAM F. WOLFF, JR. and JAMES A. WOLFF or such of them as may be surviving for the time being in equal shares except that if either WILLIAM F. WOLFF, JR. or JAMES A. WOLFF shall die his descendants as the class may from time to time be constituted shall receive the income said WILLIAM F. WOLFF, JR. or JAMES A. WOLFF would have been entitled to, if living, in equal shares per stirpes. At such time as there be none of said persons surviving, the trustee shall pay such income to the charities entitled to receive income under the following paragraph numbered "Second"

SECOND: *as to Principal:* Upon the death of the survivor of EUNICE E. STERNBERGER, EUNICE P. STERNBERGER and the Grantor, the Trustee shall transfer, assign and set over the net principal of the Trust as the same shall then consist to the descendants then living of said EUNICE P. STERNBERGER in equal shares *per stirpes*, and if there be no such descendants living upon the death of the survivor of the Grantor, his said wife and daughter, then the Trustee shall transfer, assign and set over one half (½) the net principal of the trust to BLANCHE R. WOLFF, WILLIAM F. WOLFF, JR., and JAMES A. WOLFF or such of them as may be then surviving in equal shares except that if either JAMES A. WOLFF or WILLIAM F. WOLFF, JR. is then deceased his descendants shall receive the share said JAMES A. WOLFF or WILLIAM F. WOLFF, JR. would have been entitled to, if living, in equal shares per stirpes; and said Trustee shall continue to hold the other one half (½) of the net principal of trust or the whole of said principal if none of the person's above mentioned shall then survive, in trust and shall pay over the net annual income thereof in perpetuity as follows:

a) One-quarter (1/4) thereof to NATIONAL JEWISH HOSPITAL AT DENVER.

b) One-quarter (1/4) thereof to FEDERATION FOR THE SUPPORT OF JEWISH PHILANTHROPIC SOCIETIES OF NEW YORK CITY.

c) One-quarter (1/4) thereof to THE PRESBYTERIAN HOSPITAL IN THE CITY OF NEW YORK.

d) One-quarter (1/4) thereof to one or more organizations for the welfare and betterment of the Negro race selected by the Trustee;

provided that if any of the foregoing organizations shall have ceased to exist, or if an organization named in (c) or (d) shall cease to be nonsectarian (determined as provided below) in the conduct of its affairs, the

[Tr. 32]

Trustee, shall pay over the share of income to which such organization would otherwise have been entitled to a generally similar nonsectarian charity selected by it. The Trustee for the purpose of determining nonsectarianism under this paragraph shall be entitled to rely upon an affidavit affirming the fact thereof made by an officer of the organization in question, unless affirmative evidence of sectarianism shall be brought to its attention, in which event it may request instructions of any court having jurisdiction."

2. In all other respects I do hereby confirm the said Trust Indenture of January 20, 1931, and the amendments thereto heretofore made and not heretofore or herein revoked or modified.

3. The right is fully reserved to the Grantor further to revoke, modify or amend the Trust Indenture of January 20, 1931, at any time by filing a written instrument with the Trustee.

Will you kindly acknowledge the receipt and acceptance of this amendment by signing and returning the enclosed carbon copy of this letter.

Very truly yours,

LOUIS STERNBERGER
Louis Sternberger

WITNESS:
LOUIS KARSCH

ACCEPTED: October 20, 1945
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee
By [Signature illegible]
*2nd Vice President*

[The following documents, which, together with the foregoing letter, constitute the taxpayer's Exhibit 1, are not printed here, namely, (1) the trust indenture dated January 20, 1931, referred to in said letter, and (2) various and sundry other letters of Louis Sternberger antedating said letter, which gave instructions to the bank regarding said trust indenture.]

---

[Tr. 63]

**[Exhibit 2 Attached to Stipulation]**

I, LOUIS STERNBERGER, residing at Scarsdale, New York, do hereby make, publish and declare the following as and for my Last Will and Testament:

* * * * * * * * *

[Tr. 65]

SEVENTH: I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatever kind and nature and wherever situated, of which I shall die seized or possessed or over which I shall have any power of disposition or appoint-

ment, or in which I shall have any interest, to my Trustee to hold the same in trust during the period of the joint lives of my wife EUNICE E. STERNBERGER and our daughter EUNICE P. STERNBERGER and the life of the survivor of them, to keep the same invested and to do

[Tr. 66]

and perform the following acts and things:

*First: as to Income:* To collect the income therefrom and after paying all proper charges to pay the net annual income as follows:

a) To pay to my wife EUNICE E. STERNBERGER fifty per cent (50%) of such net income during her life, in monthly installments;

b) To pay to our daughter EUNICE P. STERNBERGER the remaining fifty per cent (50%) of such net income in monthly installments during the life of my wife EUNICE E. STERNBERGER, and after the death of my said wife to pay to our daughter EUNICE P. STERNBERGER the entire net income of the trust in monthly installments so long as she shall survive, or if our daughter EUNICE P. STERNBERGER shall die before EUNICE E. STERNBERGER, then to pay all of the income to which my daughter would have been entitled hereunder, if living, to her descendants in equal shares *per stirpes* as that class may from time to time be constituted, or, if no person in such class shall then survive, to pay over such income to the charities entitled to receive income under the following paragraph.

*Second: as to Principal:* Upon the death of the survivor of EUNICE E. STERNBERGER and EUNICE P. STERNBERGER, to transfer, assign and set over the net

principal of the trust as the same shall then consist to the decendants then living of said EUNICE P. STERNBERGER in equal shares *per stirpes*, and if there be no such descendant living upon the death of the survivor of my said wife and daughter, then I direct my Trustee to continue to hold the corpus in trust and to pay over the net annual income thereof as follows:

a) One-quarter (1/4) thereof to NATIONAL JEWISH HOSPITAL AT DENVER.

b) One-quarter (1/4) thereof to FEDERATION FOR THE SUPPORT OF JEWISH PHILANTHROPIC SOCIETIES OF NEW YORK CITY.

c) One-sixth (1/6) thereof to THE PRESBYTERIAN HOSPITAL IN THE CITY OF NEW YORK.

d) One-sixth (1/6) thereof to SYDENHAM HOSPITAL, INC.

e) One-sixth (1/6) thereof to one or more organizations for the welfare and betterment of the Negro race selected by the Trustee.

Provided that if any of the foregoing organizations shall have ceased to exist, or if an organization named in (c), (d) or (e) shall cease to be nonsectarian (determined as provided below) in the conduct of its affairs, the Trustee shall pay over the share of income to which such organization would otherwise have been entitled to a generally similar nonsectarian charity selected by it. The Trustee for the purpose of determining nonsectarianism under this paragraph shall be entitled to rely upon an affidavit affirming the fact thereof made by an officer of the organization in question, unless affirmative evidence of sectarianism shall be brought to its attention, in which event it may request instructions of any court having jurisdiction.

[Tr. 67]

IN WITNESS WHEREOF, I have signed and sealed this will this 24th day of July, 1944.

LOUIS STERNBERGER

[Duly witnessed]

---

[Tr. 71]

**Official Report of Proceedings Before the Tax Court of the United States**

---

[Caption]

Hearing at New York, N. Y.
Date: November 15, 1951.

* * * * * * * * *

[Tr. 80]

THE COURT: The stipulation of facts and the exhibits attached thereto are received in evidence.

* * * * * * * * *

Whereupon,

**David Silverman**

[called on behalf of the taxpayer] testified as follows:

[Tr. 81]

Direct Examination

By Mr. Greenbaum:

Q. Please state your name and occupation. A. David Silverman. I am a consulting actuary.

Q. Would you please state your place of business and the firm with which you are affiliated? A. I am a member of the firm of Wolfe, Corcoran & Linder, at 116 John Street, New York.

Q. Would you please state your educational and professional background for the Court, please, Mr. Silverman? A. I am a graduate of McGill University in Canada. I took the business and actuarial courses there. I entered into actuarial work in 1927.

I was admitted to fellowship in the Casualty Actuarial Society in 1931. Practiced as a consulting actuary ever since 1927. My present association with Wolfe, Corcoran & Lander commenced in 1934 as an associate actuary, and I was admitted to membership in the firm in 1945.

Q. In your professional experience, Mr. Silverman, have you ever been called upon by any private or governmental agencies to prepare actuarial tables in connection with various types of probabilities dealing with vital statistics? A. Yes, we have. The firm has and I have personally.

Q. Were you asked to prepare an actuarial compu-

[Tr. 82]

tation dealing with the following three contingencies: mortality, probability of remarriage, and probability of issue, by the firm of Greenbaum, Wolff & Ernst? A. Yes, sir.

* * * * * * * * *

Q. Were you asked to render your opinion whether a computation dealing with those contingencies was feasible from the standpoint of established and recognized actuarial principles? A. Yes, sir.

Q. I hand you this paper. Would you please identify it? A. This is a letter I wrote to the firm of Greenbaum, Wolff & Ernst in September, 1948. It sets forth briefly the problem presented in this case, the method by which we made these particular computations, and the result of the computations in terms of the contingent value of the charitable remainder.

Q. Would you please state the precise problem that you worked upon in connection with this letter? A. The problem was to determine the value of the remainder to charity upon the second death of the two women, one age 27, the other age 62, provided that the younger

[Tr. 83]

woman die without issue. As of the date of our valuation she was unmarried but had previously been divorced. We therefore had four contingencies to consider, three aside from the interest rate: death, remarriage, and the probability of having issue; and we determined the basis for each of these four factors and proceeded with the computation.

The contingencies with respect to death and interest are described in the regulations. We did use the Combined Experience Table of Mortality and four percent interest. And with respect to the other contingencies —remarriage and the probability of issue—we made certain studies and computations to determine what we consider the most reliable and proper basis for a computation.

* * * * * * * * *

[Tr. 84]

Q. Mr. Silverman, in connection with the probability of remarriage, would you please state what tables you used in that connection? A. We used a table called the American Remarriage Table. That in our opinion was the best source and most reliable table for use in connection with this problem. The table had been prepared very recently. It was published in 1933. It was a result of a study made by a committee of the Casualty Actuarial Society. The study thoroughly covered the remarriage of widows under workmen's compensation cases, and the value was quite substantial. It was

an extensive study and considered quite reliable by the Casualty Actuarial Society.

Q. Were these computations referred to in this let-

[Tr. 85]

ter prepared under your personal supervison? A. Yes, they were.

Q. In connection with the third contingency you spoke of, the probability of issue, would you please explain the basic data that was used in that connection? A. The basic data was the statistics published by the Bureau of the Census of the Population Division by the Government. The statistics taken in the study all related to the 1940 census. That is, we had tables by race, sex, and age, and similar data with respect to that, and also reported the number of births in the United States by order of birth and certain supplemental data; and using such statistics as a base I compiled a table showing the probability of a married woman becoming a mother.

Q. The basic experience record from which you derived your table that you used in this connection was from what primary source? A. From the published reports of the Bureau of the Census. There are several volumes of books and we searched for those which would give this information.

Q. The tables published by the Bureau of the Census with respect to the 1940 census, do they contain data with respect to all women in the United States? A. Yes.

Q. So that your experience record from which you derived your probability of issue in this instance was

[Tr. 86]

based upon the experience record of all women in the United States in the year 1940? A. That is correct.

Q. After making these computations did you arrive at a percentage figure representing the value of these contingent remainders with respect to one-half of the estate? A. Yes, sir.

Q. And what was the valuation that you determined under the circumstances you have set forth? A. For each one dollar of corpus represented in half the estate, that is for each dollar which charity might take the present value was 24.094 cents. That is about 24 per cent.

Q. Were you also requested to make a computation based purely on the first two contingencies, mortality and the probability of remarriage, without taking into account the probability of issue in this connection? A. Yes, I was. Although it was not exactly in that manner.

Q. Would you please explain what computations you were requested to make? A. We were asked to make such a computation, and we did it in a manner which assumed that every woman who married would have issue, provided she married before age 55, and that if she married after age 55 issue would not result, would not result, so that in effect it is contingent upon remar-

[Tr. 87]

riage alone provided the remarriage occurs prior to age 55.

Q. From an actuarial standpoint what is the probability of a woman having issue after age 54? A. According to the statistics published by the census it is zero. We have the data covering about 2,000,000 births in the year 1940 according to the age of mother, and there are none reported where the mother was over 54 years of age.

Q. I hand you this document. Would you please identify it? A. Yes. That is a letter which I sent to the firm of Greenbaum, Wolff & Ernst setting forth the

result of this second calculation which represented the present value of the contingent remainder assuming issue would result in the case of every marriage which occurred prior to the age of 55. The remainder value in that case per dollar of corpus was 18.384 cents.

Q. In connection with the Combined Experience Mortality Table adopted by the Commissioner of Internal Revenue, what is the hypothetical basis on which that table is established? A. Well, the table shows certain mortality rates which were derived from an old study, and these mortality rates were applied to a hypothetical group of 100,000 people, 100,000 children at age 10, and then it shows the progression of the death of survivors during their lifetime.

Q. According to that table what would be the num-

[Tr. 88]

ber of survivors, female, age 27 from this hypothetical group of 100,000 at age 10? A. The Combined Experience Table does not distinguish between sexes. Of the 100,000 persons living at age 10 there would be surviving 88,434 at age 27.

Q. Mr. Silverman, have you prepared a memorandum explaining the basis for your computations and showing the tables and statistics which you used in making your computations you have just referred to? A. Yes, sir.

Q. In your memorandum have you taken as your starting point 88,434 unmarried women at age 27 as determined under the Combined Experience Mortality Table? A. Yes, sir.

Q. Would you please explain to the Court how you derived your final figure from that starting point as set forth in your memorandum? A. Well, the problem basically was to make use of the Combined Experience Table and not to depart from it so far as mortality is

concerned and, in effect, to break up the number of people surviving into three parts, being careful to reserve the total.

The tables which I prepared personally showed a progress of unmarried women starting with this figure of 88,434 at age 27, the progress of those unmarried,

[Tr. 89]

those married childless, and those married who had become mothers; so that the sum of the three parts equalled the total as represented by the Combined Experience Mortality Table.

Q. Will you please explain then how you interjected the probability of issue into these computations? A. The probability of issue which was derived from these tables was applied to the number of married women. It represents a percentage of a proportion that will become mothers during each year of life, and by applying that probability of issue to the number of married women exposed we did derive the number that would become mothers. As I said, we traced that group through their lifetime.

MR. GREENBAUM: At this time I would like to offer in evidence as Petitioner's Exhibit No. 3, the letter of September 20, 1948, from the witness to the firm of Greenbaum, Wolff & Ernst.

THE COURT: That is the one, I understand, on which he made the computation on which you rely in this case.

MR. GREENBAUM: That is correct.

MR. CHARSHEE: No objection. May I have a copy?

MR. GREENBAUM: Yes, you may have a copy of that. Together with the three tables attached to the letter.

THE COURT: All right. Received as Petitioner's Exhibit No. 3.

(Petitioner's Exhibit No. 3. was received in evidence.)

[Tr. 90]

MR. GREENBAUM: Petitioner offers in evidence the letter of January 27, 1950, from the petitioner to Greenbaum, Wolff & Ernst, as Petitioner's Exhibit 4.

MR. CHARSHEE: What is this?

MR. GREENBAUM: This is the second letter, which you also have.

THE COURT: That makes a different computation, as I understand.

MR. GREENBAUM: This letter makes a computation solely on the probability of remarriage, assuming that if the daughter would remarry before age 55 she would have issue.

THE COURT: So I understood.

MR. GREENBAUM: Together with the table attached.

THE COURT: Received as Petitioner's Exhibit 4.

(Petitioner's Exhibit No. 4 was received in evidence.)

MR. GREENBAUM: Petitoner offers in evidence the memorandum of November 13, 1951, prepared by David Silverman in explanation of the actuarial tables used in computations for the Estate of Louis Sternberger.

MR. CHARSHEE: No objection.

THE COURT: Be received as Petitioner's Exhibit 5.

(Petitioner's Exhibit No. 5 was received in evidence.)

By Mr. Greenbaum:

[Tr. 91]

Q. Mr. Silverman, were you also requested to make a computation adjusting your original valuation, taking into account that the daughter at age 27 would have or might have illegitimate issue as well as lawful issue? A. Yes.

Q. I hand you this paper. Would you please identify it? A. This is a letter written by me to the firm of Greenbaum, Wolff & Ernst, at a later date which discusses the effect of illegitimate issue on this problem. The fact that in our first computation it had not been completed covered or taken care of and setting forth the adjusted result after making an adjustment for illegitimate issue to the extent that it had not been previously considered.

Q. In your original computation had there been any provision in your computations that related to illegitimate issue? A. Well, not specificaly. I did not consider the problem at all originaly. But by using the Census Reports showing the number of children born, that would automatically include illegitimate children. There were no distinctions made as to the number of children born in the United States, so that they were used in deriving the probability that a woman would become a mother, and it automatically was reflected in our first computation as being in the rate.

Q. After makiag the adjustment in the computation

[Tr. 92]

referred to in your letter of November 1, 1949, what was the valuation that you then determined? A. For each dollar of corpus which might go to charity, 24.058 cents.

MR. GREENBAUM: The petitioner offers in evidence the letter from the witness to Greenbaum, Wolff & Ernst dated November 1, 1949, as Petitioner's Exhibit 6.

MR. CHARSHEE: No objection.

THE COURT: It will be received as Petitioner's Exhibit No. 6.

(Petitioner's Exhibit No. 6 was received in evidence.)

By Mr. Greenbaum:

Q. Mr. Silverman, when you originally started to make the computations that were requested of you, did you know of any tables dealing with the probability of issue in the United States? A. No. None that would have been appropriate for this purpose.

Q. Do you know, were there any tables dealing with the probability of remarriage with respect to the United States experience? A. Yes. Yes, there was.

Q. That was the American Remarriage Table that

[Tr. 93]

you used as a basis for your computations? A. Yes, sir.

Q. Are there any other remarriage tables with respect to the United States experience, to the best of your own knowledge? A. Not that I know.

Mr. Greenbaum: No further questions.

The Court: Would you like to recess for 10 or 15 minutes to read the documents?

Mr. Charshee: No, your Honor, I would not. If your Honor would like to recess—

The Court: No. I usually recess along about eleven o'clock, we will say.

Mr. Charshee: Very well. I will be through in a few minutes.

Cross-Examination

By Mr. Charshee:

Q. I just wanted to explore the question of whether or not a woman of 27 will ever have a child.

It is my understanding, or you just made the statement that there does not exist any table covering that point. A. That is right.

Q. You prepared the table as I understand it from data obtained from the Census Bureau? A. Obtained from the published reports of the Census Bureau.

[Tr. 94]

Q. What was the nature of that Census Bureau data? A. There were several tables, but it was in effect the statistics with reference to the United States in 1940. The data represented factual data, so many people.

Q. On what? On what? A. I don't understand.

Q. Factual data on what? A. With respect to the number of people living, dying, the number of births in the country, and various studies as to—

Q. As I understand it, this table just merely states the number of births in the United States during a certain period of time? A. It is more extensive than that. For example, there might be one table showing the number of women in the country by age, whether married or unmarried, a second table showing the number of married women by race, age.

Q. What was the table with respect to women having babies after 27 years of age? A. There was no such table in that form, but there were statistics showing the number of married women in the country by age and other tables showing those which had families and those which were childless.

Q. I see. A. And still further tables showing the

[Tr. 95]

number of children born in the United States and whether they were first births or showing the order of births.

Q. As I understand it, this is the first table that you have ever prepared of this character? A. That is correct, with respect—

Q. You know of no recognized table in the United States dealing with that subject? A. Not one that would be appropriate for this problem.

Q. Do you know of any legal proceeding in which the table as you prepared has ever been used? A. Well, by legal proceeding, are you thinking of tax cases or—

Q. I am thinking of any case. Of course your answer automaticaly would be no because you just made the statement it was the first table which you ever prepared and you also made the statement you did not know of any other table. So— A. I do not know.

Q. Therefore, you do not know of any legal proceeding in which such a table was used? A. I don't know of any other table that would have any recognition. But the insurance companies probably many times have made certain supplementary studies for their own use. It is likely that the large insurance compaines, every one of them, may have considered this problem.

[Tr. 96]

* * * * * * * * *

Mr Charshee: That is all.

Redirect Examination

By Mr. Greenbaum:

Q. Mr. Silverman, if you were given an experience record dealing with the number of deaths within a given life group and if you were given all of the other data that are customarily used in establishing a mortality table, from that data even though you did not have an earlier existing table, could you then determine the life expectancy of a person at a given age? A. Yes, sir. I have done it many times.

Q. If you were then given an experience record, a universal experience record with respect to the United States dealing with the number of deaths, dealing with

the number of births, dealing with the number of births to married women throughout the United States, even though there was no existing table that gave you a

[Tr. 97]

mathematical figure, from that table could any actuary after sufficient study and work determine the probability of a woman of a given age having lawful issue? A. Yes, sir, could.

Q. Is there any basic difference actuarially between the first computation which I spoke of and the second computation? That is between a mortality and a natality table, if you please? A. Basically, no. That is the methods and techniques are the same.

Q. Do you know of any proceeding in which a remarriage table has been used? A. Yes, sir, I do.

Q. In what connection was that? A. In the Maresi case, which I do not know all the details, but I do know the probability of remarriage was recognized by the courts and the American Experience Table had been used as the basis.

Q. You were familiar with what table of remarriage was used in that case, and what table was that? A. The American Remarriage Table.

Q. Is that the same table you used in your computations? A. It is.

Q. In your basic computations you relied upon (1) the mortality table adopted by the Commissioner of In-

[Tr. 98]

ternal Revenue in his estate tax regulations and, secondly, the American Remarriage Table which was adopted by the Court in the Maresi case? A. Yes, sir.

Q. The third table and the third contingency which you then added in was derived from a table which you yourself prepared but based on the records and the pub-

lished tables from the United States Bureau of the Census? A. Yes, sir.

MR. GREENBAUM: No further questions.

* * * * * * * * *

MR. CHARSHEE: Yes, that is all.

THE COURT: Let me ask a question and see if I understand it.

The first computations that you have made would be based on the American Mortality Table, and you would reach a figure that would be the valuation if there were nothing else to reduce it. But after you had arrived at that figure, then you do reduce it by these other second and third contingencies, do you? You subtract from that valuation the subtraction that would have to be made on account of the second and third contin-

[Tr. 99]

gencies, is that the way you arrived at it?

THE WITNESS: Well, that is the effect. That is not the exact method or the technique. The method is to prepare entirely new tables where the number of survivors and deaths are broken into the various groups.

THE COURT: In other words, if you did not have the contingencies there would not be any difficulty in figuring the valuation, I suppose, based on the probability of her death. If you did not have to use the contingencies you would not have any computations?

THE WITNESS: Yes. But in effect, rather than getting a result based on mortality alone and then making a subtraction, it was necessary to recast the combined experience mortality table in the three subdivisions according to marital status.

THE COURT: All these have been explained or covered in these letters and statements that have been introduced?

MR. GREENBAUM: May I just say that the memorandum that was prepared by Mr. Silverman was an attempt to explain the basic calculations in perhaps simpler language than in the original letters.

THE COURT: You are through with Mr. Silverman?

MR. GREENBAUM: No further questions.

THE COURT: All right, sir.

(Witness excused.)

[Tr. 102]

* * * * * * * * *

Whereupon,

**Richard Fondiller,**

[called on behalf of the taxpayer] testified as follows:

Direct Examination

By Mr. Greenbaum:

[Tr. 103]

Q. Please state your name. A. Richard Fondiller.

Q. What is your occupation, Mr. Fondiller? A. Consulting actuary.

Q. Would you please state your educational and professional background, Mr. Fondiller? A. Graduated from the College of the City of New York with a bachelor degree; gradnated from the Columbia University Law School with law degree; received a degree of Master of Arts from Columbia University.

Admitted to the Bar many years ago. And then in respect to experience and qualifications, I am a Fellow of the Society of Actuaries for many years; Fellow of the Academy Actuarial Society, Fellow of the Institute of—American Institute of Insurance, et cetera.

I have been connected in actuarial and executive capacities with various insurance companies, and I have been a consulting actuary for the last 29 years.

Q. In connection with your professional experience, Mr. Fondiller, have you ever acted in an actuarial capacity on behalf of any of the insurance departments of any states in the United States? A. Yes. Over long experience, computed tables of pensions for widows and children for the State of New York, calculated premium rates for the State of Ohio, represented the

[Tr. 104]

State of Michigan in certain litgation involving insurance companies, done work for the State of Colorado in actuarial capacities, and made premium rates of various kinds for hospitalization, accident, health, life insurance, for numerous life insurance companies, casualty insurance companies, and so forth.

Q. Have you heard the testimony of Mr. David Silverman in this case? A. Yes.

Q. Have you personally prepared any tables of a comparable nature to those described by Mr. Silverman? A. Way back in 1914, '15, while I was the Assistant Actuary of the New York Workmen's Compensation Commission we—under my personal supervision and under the general supervision of the actuary—tables involving mortaiity and remarriage were calculated for the use of the Workmen's Compensation Commission while I was in their employ.

Q. Mr. Fondiller, were you asked to examine the work sheets and actuarial computations prepared by Mr. David Silverman to which we have already referred? Were you asked those computations and to check upon their actuarial validity? A. Yes.

Q. And you have made such an examination? A. I have made such an examination under general supervision of our staff. I have had the figures referred to

[Tr. 105]

me for review.

Q. In your professional opinion, Mr. Fondiller, are the calculations and the results obtained by Mr. Silverman in accordance with known established, recognized actuarial principles? A. Yes, they are.

Q. Mr. Fondiller, if you had been asked to make the same computations, would your methodology, your actuarial technique, have been any different than those employed by Mr. Silverman in making his computations? A. No.

Q. In your opinion, Mr. Fondiller, would any recognized and reputable actuary called upon to make the same computations have used any different techniques and methodology than that employed by Mr. Silverman? A. No, sir.

Q. I hand you this paper. Would you please identify it? A. This is a certificate from me dated November 14, 1951 certifying to the fact that the calculations of Wolfe, Corcoran and Linder in their letter of September 20, 1948, and their letter of January 27, 1950, were done in accordance with actuarial procedures.

MR. CHARSHEE: No objection.

MR. GREENBAUM: Petitioner offers the letter certificate of Mr. Richard Fondiller dated November 14, 1951,

[Tr. 106]

in evidence as Petitioner's Exhibit No. 7.

THE COURT: Be received in evidence as Petitioner's Exhibit No. 7.

(Petitioner's Exhibit No. 7 was received in evidence.)

By Mr. Greenbaum:

Q. Are you familiar with the American Remarriage Table? A. Yes.

Q. Are you familiar with the fact that that table was used as a basis for computation in the Estate of Maresi,

a case tried in the Tax Court of the United States? A. I am familiar with that.

Q. In your opinion, Mr. Fondiller, is the table used by Mr. Silverman with respect to the probability of issue of a white female, age 27, more reliable or less reliable than the computations of the results obtained in the American Remarriage Table? A. Why, they are more reliable for the reason that in actuarial science what we deal with is the number of years of exposure to death, accident, to remarriage, birth. The number of years of exposure in the American Remarriage Table are somewhat less than 100,000 years; on the other hand, in Mr. Silverman's calculation dealing with white, unmarried females in the entire United States there are quite a few million years of exposure.

[Tr. 107]

Q. In your opinion, is the method of securing data relied upon by the Bureau of the Census a reliable method of securing basic actuarial data? A. I would regard it as being sound for the reason that there are so many millions of lives involved and the probability of errors either one way or the other way are neutralized over such a very large exposure of lives.

Q. In connection with the American Remarriage Table, could you state the basic experience record from which that table was derived? A. In these United States there are men killed in industry who leave widows. These widows are entitled to life pensions as long as they remain unmarried. As soon as they remarry their pensions cease. And a committee of the Casualty Actuarial Society made an investigation as to what happened to these widows, namely did they remarry or did they not, and secured the experience from all the insurance companies and from the various workmen's compensation boards in the United States, and

developed therefrom a table showing the rate of remarriage, just as we have in life insurance the table of mortality.

Q. Was the American Remarriage Table originally published in the proceedings of the Casualty Actuarial Society? A. Yes.

Q. Are you officially affiliated with the Casualty Ac-

[Tr. 108]

tuarial Society? A. Yes. I have been the secretary of the Society and still am, and have been secretary of the Society for 33 years.

Q. Are you familiar with the manner in which papers published in the annual proceedings are determined? A. Yes.

Q. In connection with the American Remarriage Table published in those proceedings, did the Casualty Actuarial Society make any reservation or any comments with respect to the validity of the table of which we are speaking. A. No, sir, they did not.

* * * * * * * * *

Q. In your opinion, Mr. Fondiller, would the Casualty Actuarial Society publish a table prepared in the manner in which Mr. Silverman has prepared an isolated table solely with respect to the age 27 but if that were expanded to all ages would the Casualty Actuarial

[Tr. 109]

Society publish such a table? A. Yes.

Q. In your opinion, would the Casualty Actuarial Society have any reservation with respect to the validity of such a table if it were published? A. If the table were calculated on the basis comparable to that of the American Remarriage Table or any mortality table with sufficient data, the table would be published and included in the proceedings of the Society.

Q. Are you familiar with the discussion in the Maresi case dealing with prior remarriage tables other than the American Remarriage Table that was used in that case? A. Yes.

Q. What was the exposure or the experience record used as the basis of these other remarriage tables?

* * * * * * * * *

A. Well, there were other remarriage tables that had been employed before the American Remarriage Table. For example, the Dutch Remarriage Table had been used for many years in the United States for the reason that there had been no American experience com-

[Tr. 110]

piled. Now, that the American Remarriage Table has been compiled, that is the standard in the United States. In other words, for lack of any United States experience we used the experience of the Dutch Royal Insurance Institute of Holland.

Q. In your opinion, would a table based upon the experience record of 1500 members, male members of the Scotch peerage be an adequate basis for a remarriage table or a table, or a table dealing with probability of issue? A. Not in my opinion.

Q. Are you familiar with the general literature in the actuarial field? A. Yes.

Q. Do you know of your own personal knowledge whether there are any tables dealing with remarriage and the probability of issue in any countries outside the United States? A. Yes.

Q. Would you please tell us about these other tables outside the United States?

MR. CHARSHEE: I think the tables themselves are the best evidence.

THE WITNESS: I have them here, counsel. I have personal knowledge of this because it is published in the

proceedings of the Casualty Actuarial Society, which is the Society of which I have been secretary for many years. And the background is this official table of the

[Tr. 111]

Minister of Labor of France. These are the original tables and the text is printed in French, entitled "Document No. 10 of the Minister of Labor, Tables de Nuptialite et Natalite," tables of marriage and birth. And on the title page it states that the Minister of Labor had to issue these official tables for the reason that a law had been passed in 1921 providing for insurance companies insuring these two forms of insurance.

Then in 1932 a paper was presented to the Casualty Actuarial Society and accepted and printed in the proceedings of the Society, volume 18, from pages 405 to 440. This paper is entitled "Marriage and Birth Insurance in France" by Henry Balu, member of the French Institute of Actuaries and the actuary for Europe of the Equitable Life Assurance Society of the United States.

And in this paper he describes the fact that there are three insurance companies writing this form of insurance. And he gives various mathematical formula and tables, and he also has in there on page 437 a table entitled "table of reproductive rates." In other words, it is a birth rate just like we were talking of the rate of mortality. This is the rate of birth at certain ages based upon the French census.

Q. Mr. Fondiller, are you familiar with the actuarial methods and the actuarial techniques that were employed as the basis for this French table to which you have been referring? A. Yes.

[Tr. 112]

* * * * * * * * *

Q. From the standpoint of the basic exposure or the experience from which these two tables have been derived, the French table and Mr. Silverman's single table, in your opinion, which is the more reliable? A. Well, I would regard the French table as being reliable because it does cover the exposure of many million females. On the other hand, we have to remember that the United States population of unmarried females, the exposure is more than double that of the French table. So that we can certainly say any calculations based upon American experience are really dependable.

[Tr. 113]

* * * * * * * * *

Q. I hand you this document. Would you please identify it? A. This is report No. 10 of the Minister of Labor of France.

Q. Referring to page— A. 25.

Q. —25 of that document, would you please tell us what the probability of a woman, age 27, having issue in accordance with that table—

MR. CHARSHEE: I thought that was in French. Is he interpreting this?

THE WITNESS: The figures are in English.

[Tr. 114]

* * * * * * * * *

MR. GREENBAUM: If your Honor please, I would like to call attention to one particular single item in this entire table, rather than—

THE COURT: He may. He may.

THE WITNESS: The figure for age 27 females is .2088 which means that in a single year out of 1,000 females, married females, there will be 208 births out of each 1,000.

MR. GREENBAUM: The petitioner offers the French tables in evidence as Petitioner's Exhibit No. 8.

MR. CARSHEE: I have no objection.

THE COURT: Be received as Petitioner's Exhibit No. 8.

(Petitioner's Exhibit No. 8 was received in evidence.)

* * * * * * * * *

THE COURT: Is it necessary to put all the tables in or just some specific table?

MR. GREENBAUM: I would just introduce page 25, if

[Tr. 115]

that is satisfactory to the Court and to counsel.

THE WITNESS: And the title page.

MR. CHARSHEE: That is satisfactory. And showing the year.

THE COURT: Yes. And page 25.

MR. GREENBAUM: The title page has the year.

By Mr. Greenbaum:

Q. Mr. Fondiller, if an insurance company in the United States were to write insurance similar to that in vogue in France, and if such a company were to come to you to prepare a table to be used as the basis for their business, would you use the same method employed by the French table and Mr. Silverman's table in establishing such a table?

* * * * * * * * *

THE WITNESS: Yes.

THE COURT: You mean you would use the same method?

THE WITNESS: I would.

[Tr. 116]

* * * * * * * * *

By Mr. Greenbaum:

Q. Are you familiar with the tables that are prepared for use by insurance companies with respect to life insurance? A. Yes, I am.

Q. Are you also familiar with the tables used by insurance companies with respect to what is commonly known as double indemnity policies or policies in which payment of insurance proceeds is made for death by accident? A. Yes.

Q. In your opinion, from an actuarial standpoint is there any difference between the valuation used for life insurance or the valuation used for accident insurance? A. Well, in a life insurance policy which is payable at death, there we figure the rate of mortality each year, as we all know every person must die, so that the

[Tr. 117]

amount of insurance involved must be paid at death. However, when it comes to double indemnity, tables have been developed showing the probability of death by accident at all ages. Some will die by accident and some will not. And it is this probability that is calculated to be the basis for calculating a premium rate to pay in the event of death by accident.

Mr. Greenbaum: No further questions by the petitioner.

Cross-Examination

By Mr. Charshee:

Q. Did you hear my questions that I asked Mr. Silverman on cross-examination, and did you also hear his answers? A. Yes, sir.

Q. Would your answers be the same? A. Yes, sir.

Q. I just want to ask you a couple of questions now about this French table that you say was prepared there. What year was that prepared? A. The French

law was passed in 1921 and the table was prepared—the regulations were issued in the year 1921.

Q. What method was used by the French authorities in compiling that table? A. They used the census returns for the years 1901, 1905—1901, 1906, and 1911, because a census is taken in France every five years.

[Tr. 118]

Q. Do I understand, then, that they used the same method in arriving at the table covering the contingency of having a child as Mr. Silverman did? A. Yes, sir.

Q. What were those French tables used for—for what purpose? A. They were used in order to—for the Minister of Labor to issue regulations to insurance companies, because when insurance companies wanted to write this form of insurance the French Government wanted to know that it, the companies, would remain solvent and that they would charge adequate premium rates for birth insurance and marriage insurance, and hence these regulations.

MR. CHARSHEE: That is all.

MR. GREENBAUM: One question.

Redirect Examination

By Mr. Greenbaum:

Q. The tables you have been referring to, when were they printed in the proceedings of the Casualty Actuarial Society? A. They were printed on May 20, 1932.

MR. GREENBAUM: No further questions.

* * * * * * * * *

[Tr. 119]

* * * * * * * * *

MR. CHARSHEE: No further questions.

THE COURT: Is that all, Mr. Greenbaum?

MR. GREENBAUM: Yes, your Honor, that is all for this witness.

(Witness excused.)

---

[Tr. 124]

**Taxpayer's Exhibit 3**

September 20, 1948

Greenbaum, Wolff & Ernst
285 Madison Avenue
New York 17, N. Y.

Gentlemen:

Re: Estate of Louis Sternberger, Deceased
Date of Death, June 25, 1947
Westchester County, New York

At your request, we have determined the present value of the charitable remainder under the will of the above deceased at date of death. The data on which we have based our calculations is as follows:

| | | |
|---|---|---|
| 1. Total Gross Value of Estate | | $2,406,541.71 |
| Less: Various Expenses | $102,646.37 | |
| Charitable Bequest to Seamans Church Institute | 1,000.00 | |
| Bequests to Marion and Robert Gans | 2,000.00 | |
| Bequest to Wife (Personal Effects) | 1,727.00 | 106,767.97 |
| Net Balance on which to base Charitable Remainder | | $2,299,773.74 |

2. Under the terms of the will, Eunice E. Sternberger, widow, and Eunice P. Sternberger, daughter, have a joint survivorship life interest in the income of the estate and upon the death of the survivors, the corpus is to be paid to the then living descendants of

Eunice P. Sternberger and if there be no such descendants, one-half of the net income of the trust is to be paid in perpetuity to certain charitable institutions.

3. Eunice E. Sternberger, widow, was born on May 20, 1885 and at the date of testator's death, June 25, 1947, was 62 years old.

4. Eunice P. Sternberger, daughter, was born on March 2, 1920 and at the date of testator's death, June 25, 1947, was 27 years old.

5. Eunice P. Sternberger, daughter, was married January 16, 1942 and divorced March 31, 1944, at which time she was 24 years old. At the date of testator's death and at the present time she has not remarried and

[Tr. 125]

has had no issue.

6. The mortality table used in determining the charitable remainder was the Combined Experience Table of Mortality.

7. The remarriage table used in determining the charitable remainder was the American Remarriage Table as set forth in the proceedings of the Casualty Actuarial Society, Volume XIX, page 332.

8. With respect to the probability of issue, we found no maternity rates in publications which were appropriate for use in these calculations. We, therefore, derived maternity rates from the data contained in the reports of the Bureau of the Census which reflect the probability that a childless white married female will become a mother. The basic data used in the compilation of such rates was taken from the reports of the Bureau of the Census showing the number of white females in 1940 according to the age and the number of births during 1940 according to the age of the

mother. From this data we derived maternity rates according to the age of the mother in such manner that only the first birth was considered, that is, our maternity rates represent the probability that a married female will become a mother by the birth of her first child. It is worthy of note that our calculations gave no consideration to the probability of death of the issue, that is, it has been assumed that if Eunice P. Sternberger married and became the mother of a child, the child would survive her; also in our calculations no consideration was given to the possibility of Blanche R. Wolff, niece, William F. Wolff, Jr. and James A. Wolff, grand nephews of the deceased, predeceasing the widow and daughter and William F. Wolff, Jr. and James A. Wolff leaving no issue, in which event all of the corpus instead of one-half therof would revert to charity. These facts result in the computation understating the value of the remainder to charity.

9. In all of the calculations we have assumed an interest rate of 4%.

In accordance with the foregoing, we have determined that the value of the charitable remainder is $.24064 per $1 represented in the one-half of the estate which may go to charity.

[Tr. 126]

Copies of our work sheets used in making the calculations are attached.

Yours very truly,

WOLFF, COCHRAN AND LINDER

[Attached to the taxpayer's Exhibit 3 are three work sheets, which are not printed here.]

[Tr. 130]

**Taxpayer's Exhibit 4**

January 27, 1950

Greenbaum, Wolff & Ernst
285 Madison Avenue
New York 17, N. Y.

Gentlemen:

Re: Estate of Louis Sternberger, Deceased
Date of Death, June 25, 1947

On September 20, 1948 we submitted a computation of the value of a remainder interest under the will of the above deceased at date of death. Such value was contingent upon whether Eunice P. Sternberger, daughter, would have issue.

We have recomputed the value of the remainder interest based on exactly the same facts as stated in our letter of September 20, 1948, except that the value of the remainder has been made contingent upon whether Eunice P. Sternberger marries, without regard to issue. Briefly stated, our calculation represents the value at date of death of $1 payable upon the death of both the widow, age 62, and the daughter, age 27, provided that the daughter, who had been divorced three years previously, does not remarry.

In making this calculation we have used the Combined Experience Table of Mortality with 4% interest and the American Remarriage Table.

The value per $1 of remainder is $.18384.

We have previously sent you a photostatic copy of a work sheet showing the application of the American Remarriage rates to the number living according to the Combined Experience Table. We are attaching hereto a photostatic copy of our work sheet which shows the calculation of the value, $.18384, using the numbers

representing married and unmarried lives previously furnished you.

Yours very truly,

WOLFE, CORCORAN AND LINDER
By: DAVID SILVERMAN
David Silverman

[Attached to the taxpayer's Exhibit 4 is a work sheet, which is not printed here.]

---

[Tr. 132]

**Taxpayer's Exhibit 5**

MEMORANDUM

In Explanation of the Actuarial Tables used in Computations for the Estate of Louis Sternberger

Prepared by
David Silverman, F.C.A.S.,
of Wolfe, Corcoran and Linder
Consulting Actuaries
November 13, 1951

[Tr. 133]

*The Problem*

The problem here at hand is to determine the present value of a charitable remainder which is to take, if at all, upon the second death of two women, ages 27 and 62, provided the former, who is unmarried but divorced, shall die childless. The contingencies to be considered are, therefore, death, remarriage, birth, and the rate of interest. A brief discussion and explanation of each of these contingencies follows.

*Death Rates*

The death rate at any age may be defined as the probability that a person of that age will die within one

year. The death rates used for the present problem are those of the Combined Experience Mortality Table, which is the table prescribed by the Bureau of Internal Revenue for use in such cases.

### *Remarriage Rates*

A remarriage rate is the probability that a person previously married will remarry within one year. It is known that remarriage rates for women depend not only on age, but also on the time elapsed since the previous marriage. Under the present problem, it has been assumed that the charitable interest will take if the younger woman does not remarry.

Remarriage rate studies have not been as numerous as studies of death rates. The outstanding study based on American experience was that conducted by a Committee of the Casualty Actuarial Society and published as the American Remarriage Table in Volume 19, pp. 279-349, of that Society's Proceedings, in 1933. The following excerpt from the Committee's report gives some background of the table.

[Tr. 134]

> "*Source, Volume and Compilation of Data*
>
> The basic data were obtained from individual case reports submitted by insurance carriers, both private and state funds, in compliance with a call issued by the Committee through the National Council. The reports were limited to widows who, through the death of their husbands, became beneficiaries under workmen's compensation laws in states where their status as beneficiaries changes on remarriage. The reports filed covered the experience for policy years 1911 to 1929 inclusive."

On page 298, the following comment appears:

> "The American Remarriage Table based upon an adequate volume of American experience and constructed as outlined in the preceding paragraphs may with reasonable safety be adopted for countrywide use."

In the computations, the remarriage rates of the American Remarriage Table were combined with the death rates of the Combined Experience Mortality Table in order to determine the survivors and the deaths according to marital status. The results still represent the Combined Experience Mortality Table, the only additional feature being that survivors and deaths were divided into two categories, the married and the unmarried, as is illustrated by the following table:

| | Number of Survivors out of 88,434 Unmarried Women at Age 27 | | | |
|---|---|---|---|---|
| | Combined Experience | Combined Experience Mortality Table, Including Remarriage Rates | | |
| Age | Mortality Table | Unmarried | Married | Total |
| 30 | 86,292 | 71,669 | 14,623 | 86,292 |
| 40 | 78,653 | 50,307 | 28,346 | 78,653 |
| 50 | 69,517 | 39,683 | 29,834 | 69,517 |

### *Maternity Rates*

From the conditions of the present problem, the charitable interest may take, even if the woman aged 27 does remarry, provided that no issue results from the marriage. It is necessary, therefore, to consider birth rates, that is, the probability of a married woman giving birth to a child.

Unlike death rates and remarriage rates, maternity rates were not available in such explicit form as to be

[Tr. 135]

directly adaptable to the present problem. However, the United States Bureau of the Census has published very voluminous vital statistics and from this source maternity rates were especially computed for use in this specific case.

From Table 3 on page 89 of the Vital Statistics of the U.S., 1940, Part II, headed "Live Births by Age of Mother, Race and Number of Child: United States and Each State, 1940", the number of white, first born, children born throughout the United States during 1940, was determined according to the age of the mother. The only adjustment necessary was to exclude the 65,103 white births in Massachusetts because birth certificates in that state do not require the number of the child in order of birth, and so it could not be determined how many were first children. The data used, therefore, covers 766,674 first births in 47 states plus the District of Columbia.

It was necessary next to determine, by age of mother, and for the same geographical area, the number of married but childless women to serve as the proper exposures for the required maternity rates. The 1940 census release of the Bureau of the Census, Population Division, Series P-10, No. 6, furnished the total white female population in 1940, distributed by age, and also the number and proportion that were married. Also, from the population Division's Second Series, the number of white females in Massachusetts alone in 1940 was available, so that the white female married population of the United States, excluding Massachusetts, was determined.

From Table 9, page 119, of the 1940 Population Statistics, headed "Families by Race and Nativity of Head and Tenure, by Marital Status, Age, and Sex of Head, and Number of Children under 18 years Old,

for the United States, 1940", the total number of families and also the number and proportion of fam-

[Tr. 136]

ilies with no children under 18 was obtained. Study and adjustment of this data permitted determination of a close estimate of the percentages of all families that are childless, such percentages being available for the various ages of the wife. The application of these percentages to the white married female population, excluding Massachusetts, determined the number of white married females that were childless. The ratios of the number of first children born to the numbers of these females, by age, gave the required maternity rates.

As mentioned when remarriage rates were discussed, the introduction of maternity rates as well as remarriage rates into the Combined Experience Mortality Table in no wise alters the fact that the results still represent that Mortality Table. The only additional feature is that survivors and deaths are divided into three categories, as is illustrated by the following table:

Number of Survivors
out of 88,434 Unmarried Women at Age 27

| | Combined Experience Mortality | Combined Experience Mortality Table, Including Remarriage and Maternity Rates | | | |
|---|---|---|---|---|---|
| | | | Married but | | |
| Age | Table | Unmarried | Childless | Mothers | Total |
| 30 | 86,292 | 71,669 | 11,863 | 2,760 | 86,292 |
| 40 | 78,653 | 50,307 | 17,733 | 10,613 | 78,653 |
| 50 | 69,517 | 39,683 | 19,884 | 9,950 | 69,517 |

*Interest Rate*

The computation of the present value of a future payment necessarily involves the element of interest. The Bureau of Internal Revenue has prescribed a rate

of 4% per annum compounded annually, and this rate has been used in the computations.

*Tables Prepared for Computations*

Three tables, copies of which are attached hereto, have been prepared and designated as Exhibits I, I-A, and II. These tables are intended to reflect portions

[Tr. 137]

of the Combined Experience Mortality Table according to marital and maternal status.

In Exhibit I are shown the remarriage and death rates, numbers of survivors by marital status, and yearly decrements, by mode of exit, from the original group of 88,434 unmarried females. Figures are shown from ages 27 through 54, the latter age representing the child bearing age limit according to the statistics used for this purpose. Some figures shown for isolated higher ages were needed for purposes of computation.

Exhibit I-A is merely an extension of Exhibit I, carrying the figures down through age 78, the maximum age of remarriage according to the American Remarriage Table. These figures were needed for certain other computations, and the values at the two isolated advanced ages were similarly required.

Exhibit II breaks down the number of married females emerging in Exhibit I, according to whether they are childless or mothers at the various ages. The maternity rates used and the numbers of survivors are shown, and the yearly decrements by mode of exit reflect the distinction made between mothers and other married females.

It is worthy of note that none of the tables attached or the computations based thereon consider the longevity of a child. The assumption made is that if the

woman aged 27 becomes a mother, then her first child will survive her.

[Attached to the taxpayers Exhibit 5 are the three tables therein referred to as Exhibits I, I-A, and II, which are not printed here]

---

[Tr. 141]

**Taxpayer's Exhibit 6**

Greenbaum, Wolff & Ernst — November 1, 1949
285 Madison Avenue
New York 17, N.Y.
Attention: Mr. William F. Wolff

Gentlemen:

Re: Estate of Louis Sternberger, Deceased

In connection with the value of the charitable remainder under the will of the above named deceased, we are submitting herewith certain additional facts which supplement our letter of September 20, 1948. The additional information relates to the problem and to the effect upon the remainder value of the contingency of illegitimate issue.

While the computations outlined in our letter of September 20, 1948 did not specifically cover this contingency, nevertheless, the methods employed did give some weight to the probability that a woman might give birth to an illegitimate child. In paragraph 8 we stated that the basic data used in the compilation of maternity rates was taken from the Bureau of the Census reports showing the number of births during 1940 according to the age of the mother. The number used covered all births whether or not legitimate, so that the calculation of the maternity rates automatically included some provision for illegitimate children. However, it is true that this number of births was then re-

lated to the number of married women, the net effect being that our report of September 20, 1948 gave only partial effect to the contingency under consideration.

We have been able to secure some additional data with respect to illegitimate births which, for this purpose, may be considered to be reliable. The 1946 report on vital statistics published by the Federal Security Agency of the United States shows the following figures which represent the number of illegitimate children born to white mothers out of each 1,000 births.

| Year | Number |
|---|---|
| 1940 | 19.4 |
| 1941 | 19.0 |
| 1942 | 17.0 |
| 1943 | 16.3 |
| 1944 | 19.6 |
| 1945 | 22.8 |
| 1946 | 20.3 |

Since the former calculations were based primarily on the figures from the 1940 census, we have adopted the 19.4 per 1,000 proportion of illegitimate births in order to be consistent. Actually, the figure for this year is only slightly different from the average for the seven year period.

This proportion of 19.4 illegitimate births per 1,000 was used to adjust our former calculations which resulted in a value of the charitable remainder of $.24994 per $1 represented in the one-half of the estate which may go to charity. In effect, we have made an overall adjustment by subtracting 1.94% from the number of births which were related to married women, and then by applying 1.94% of the number born to unmarried women in the corresponding age group, to secure an overall rate of illegitimate birth. These two rates, added together, enabled us to adjust the value previously reported to you.

The net result is that the increased probability of issue reduces the value per $1 of remainder to charity from .24094 to .24058. The reduction in value is only about .2%. While this may appear to be a rather small reduction, it should be born in mind that our original calculation did make partial provision for illegitimate births and this reduction is intended only to provide for the additional probability of issue not previously accounted for. It is our opinion that the figure of .24058 does make full provision for the probability of issue, whether or not legitimate.

Yours very truly,

WOLFE, CORCORAN & LINDER

---

[Tr. 143]

**Taxpayer's Exhibit 7**

November 14, 1951

Greenbaum, Wolff & Ernst
285 Madison Avenue
New York 17, New York

Gentlemen:

Re: Estate of Louis Sternberger, Deceased
Date of Death June 25, 1947

We have reviewed the calculation of the value of the charitable remainder by Wolfe, Corcoran and Linder in accordance with the assumptions stated in their letter of September 20, 1948.

We find that such value was calculated in accordance with standard actuarial procedure.

We have also reviewed the calculation of the value by Wolfe, Corcoran and Linder in accordance with the assumptions stated in their letter of January 27, 1950 and

find that such value also was calculated in accordance with standard actuarial procedure.

Sincerely yours,

RICHARD FONDILLER
Fellow of Society of Actuaries
Fellow of Casualty Actuarial Society

RF.ca

---

[Tr. 144]

**Taxpayer's Exhibit 8**

Recueil de Documents
Relatifs
Aux Assurances Sur La Vie
Réunis
Par le Ministère du Travail
(Contrôle des assurances privées)

---

No. 10

---

Tables de Nuptialité et de Natalité
D'Après
Les Bases Fixées Par le Décret du 22 Juin 1921,
Rendu en Exécution de L'Article 2 de la Loi du
26 Mai 1921,
Relative à la Surveillance et au Contrôle
Des Entreprises D'Assurance-Nuptialité et
D'Assurance-Natalité
[Medalion]
Paris

Imprimerie Nationale

---

1922

[Tr. 145]

## Table V

### Table of Reproductive Rates

| Father's age | Males | Mother's age | Females |
|---|---|---|---|
| 15 years | " | 15 years | 0.4092 |
| 16 " | " | 16 " | 0.3061 |
| 17 " | " | 17 " | 0.2731 |
| 18 " | 0.4471 | 18 " | 0.2633 |
| 19 " | 0.3292 | 19 " | 0.2641 |
| 20 " | 0.2932 | 20 " | 0.2690 |
| 21 " | 0.2843 | 21 " | 0.2736 |
| 22 " | 0.2872 | 22 " | 0.2746 |
| 23 " | 0.2946 | 23 " | 0.2700 |
| 24 " | 0.3013 | 24 " | 0.2565 |
| 25 " | 0.3031 | 25 " | 0.2445 |
| 26 " | 0.2977 | 26 " | 0.2270 |
| 27 " | 0.2855 | 27 " | 0.2088 |
| 28 " | 0.2677 | 28 " | 0.1916 |
| 29 " | 0.2472 | 29 " | 0.1753 |
| 30 " | 0.2263 | 30 " | 0.1620 |
| 31 " | 0.2065 | 31 " | 0.1498 |
| 32 " | 0.1885 | 32 " | 0.1389 |
| 33 " | 0.1727 | 33 " | 0.1280 |
| 34 " | 0.1588 | 34 " | 0.1192 |
| 35 " | 0.1464 | 35 " | 0.1095 |
| 36 " | 0.1353 | 36 " | 0.0993 |
| 37 " | 0.1250 | 37 " | 0.0886 |
| 38 " | 0.1151 | 38 " | 0.0774 |
| 39 " | 0.1055 | 39 " | 0.0661 |
| 40 " | 0.0958 | 40 " | 0.0554 |
| 41 " | 0.0861 | 41 " | 0.0455 |
| 42 " | 0.0765 | 42 " | 0.0368 |
| 43 " | 0.0672 | 43 " | 0.0249 |
| 44 " | 0.0584 | 44 " | 0.0164 |
| 45 " | 0.0503 | 45 " | 0.0107 |

| Father's age | Males | Mother's age | Females |
|---|---|---|---|
| 46 " ..... | 0,0430 | 46 " ..... | 0,0071 |
| 47 " ..... | 0,0365 | 47 " ..... | 0,0048 |
| 48 " ..... | 0,0306 | 48 " ..... | 0,0033 |
| 49 " ..... | 0,0263 | 49 " ..... | 0,0025 |
| 50 " ..... | 0,0223 | 50 " ..... | 0,0017 |

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR, RESPONDENT.

On Petition for Review of the Decision of the Tax Court of the United States

RESPONDENT'S APPENDIX

GREENBAUM, WOLFF, & ERNST,
*Attorneys for Respondent.*

EDWARD S. GREENBAUM,
WILLIAM F. WOLFF, JR.,
MAURICE C. GREENBAUM,
CHARLES E. HEMING,
*Of Counsel.*

Filed October 2, 1953, A. M. BELL, *Clerk*, United States Court of Appeals, Second Circuit.

APPENDIX

EXHIBIT 2

* * * * *

FIRST: I hereby amend and modify Article "SEVENTH" of my aforesaid last Will and Testament so that the said Article "SEVENTH" will now read as follows:

"Seventh: I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of whatever kind and nature and wherever situated, of which I shall die seized or possessed or over which I shall have any power of disposition of appointment, or in which I shall have any interest, to my Trustee to hold the same in trust during the period of the joint lives of my wife, EUNICE E. STERNBERGER and our daughter EUNICE P. STERNBERGER, and the life of the survivor of them, to keep the same invested and to do and perform the following acts and things:

*First: as to Income:* To collect the income therefrom and after paying all proper charges to pay the net annual income as follows:

a) The Trustee shall pay to my wife EUNICE E. STERNBERGER, fifty per cent (50%) of such net income during the

life of our daughter EUNICE P. STERNBERGER and in the event of the demise of ou. daughter EUNICE P. STERNBERGER thereafter such sums as hereinafter provided. Said income will be paid during said EUNICE E. STERNBERGER's life in monthly installments.

b) The Trustee shall pay to my daughter EUNICE P. STERNBERGER, the remaining fifty per cent (50%) of such net income in monthly installments during the life of my wife EUNICE E. STERNBERGER and in the event of the demise of my said wife, shall pay to said EUNICE P. STERNBERGER the entire net income of the trust in monthly installments during her life.

c) If my daughter EUNICE P. STERNBERGER shall die before EUNICE E. STERNBERGER, then the Trustee shall pay the entire net income of the trust as follows:

1. Sixty percent (60%) thereof to EUNICE E. STERNBERGER during her life.

2. Forty percent (40%) thereof to EUNICE P. STERNBERGER's descendants in equal shares per stirpes as that class may from time to time be constituted, and at such time as no person in such class shall then survive then to pay said income to my niece BLANCHE R. WOLFF and my grandnephews WILLIAM F. WOLFF, JR., and JAMES A. WOLFF or such of them as may be surviving for the time being in equal shares except that if either WILLIAM F. WOLFF, JR. or JAMES A. WOLFF shall die his descendants as the class may from time to time be constituted shall receive the income said WILLIAM F. WOLFF, JR. or JAMES A. WOLFF would have been entitled to, if living, in equal shares per stirpes. At such time as there be none of said persons surviving, the trustee shall pay such income to the charities entitled to receive income under the following paragraph numbered "Second".

*Second: as to Principal:* Upon the death of the survivor of EUNICE E. STERNBERGER and EUNICE P. STERNBERGER, the Trustee shall transfer, assign and set over the net principal of the Trust as the same shall then consist to the descendants then living of said EUNICE P. STERNBERGER in equal shares *per stirpes*, and if there be no such descendants living upon the death of the survivor, then the Trustee shall transfer, assign and set over one half (½) the net principal of the trust to BLANCHE R. WOLFF, WILLIAM F. WOLFF, JR., and JAMES A. WOLFF or such of them as may be then surviving in equal shares except that if either JAMES A. WOLFF or WILLIAM F. WOLFF, JR., is then deceased his descendants shall receive the share the said JAMES A. WOLFF or WILLIAM F. WOLFF, JR., would have been entitled to, if living, in equal shares per stirpes; and said Trustee shall continue to hold the other one half (½) of the net principal of trust or the whole of said principal if none of the persons above mentioned

shall then survive, in trust and shall pay over the net annual income thereof in perpetuity as follows:

a) One-quarter (1/4) thereof to NATIONAL JEWISH HOSPITAL AT DENVER.

b) One-quarter (1/4) thereof to FEDERATION FOR THE SUPPORT OF JEWISH PHILANTHROPIC SOCIETIES OF NEW YORK CITY.

c) One-quarter (1/4) thereof to THE PRESBYTERIAN HOSPITAL IN THE CITY OF NEW YORK.

d) One-quarter (1/4) thereof to one or more organizations for the welfare and betterment of the Negro race selected by the Trustee;

provided that if any of the foregoing organizations shall have ceased to exist, or if an organization named in (c) or (d) shall cease to be nonsectarian (determined as provided below) in the conduct of its affairs, the Trustee shall pay over the share of income to which such organization would otherwise have been entitled to a generally similar nonsectarian charity selected by it. The Trustee for the purpose of determining nonsectarianism under this paragraph shall be entitled to rely upon an affidavit affirming the fact thereof made by an officer of the organization in question, unless affirmative evidence of sectarianism shall be brought to its attention, in which event it may request instructions of any court having jurisdiction."

OFFICIAL REPORT OF PROCEEDINGS BEFORE THE TAX COURT OF THE UNITED STATES

[Caption]

Hearing at New York, N. Y.
Date: November 15, 1951.
[Tr. 79]

* * * * *

Mr. CHARSHEE: Your Honor, with respect to the first issue, the Commissioner has relied upon *Humes versus United States*, 276 U. S. 487. In the *Humes* case, there was a need, a young girl of 15 years of age, and if she had a child before she was 40 the charitable contributions would have been defeated. Now, with respect to whether or not that young lady would have a child prior to the time she was 40 the Supreme Court made the following statement:

"Neither the taxpayer nor revenue officer, even if equipped with all the aid which the actuarial art can supply, could do more than guess at the value of this contingency."

In other words, in that case, there was an actuarial table submitted to the Supreme Court, and Justice Brandeis, I think it was,

said that it lent no value to the Court, that it was a mere guess as to whether or not a young woman of that age would have a child prior to the time she was 40. And relying on that language of the Supreme Court, the same situation exists here, and we think it can be nothing more nor less than a guess as to whether or not this young woman of 27 would have a child, and therefere we think no value could be placed upon these contingent remainders.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1953

No. 34

Argued October 15, 1953. Decided November 6, 1953

Docket No. 22701

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR, RESPONDENT

Before: L. HAND, SWAN and A. N. HAND, *Circuit Judges*

Appeal from a decision of the Tax Court of the United States (18 T. C. 836), BLACK, *Judge*

*Melva M. Graney*, for the petitioner.
*Eduard S. Greenbaum*, for the respondent.

PER CURIAM:

The judgment of the Tax Court is affirmed on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2).

[Endorsed:] United States Court of Appeals, Second Circuit. Commissioner of Internal Revenue v. Estate of Louis Sternberger. (34). Judgment. United States Court of Appeals, Second Circuit. Filed November 6, 1954[3]. Alexander M. Bell, Clerk.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of November one thousand nine hundred and fifty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, *Circuit Judges*

Commissioner of Internal Revenue, petitioner

*v.*

Estate of Louis Sternberger & Chase National Bank, Executor, respondent

Appeal from The Tax Court of the United States

This cause come on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

(S.) Alexander M. Bell,
*Clerk.*

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, A. Daniel Fusaro, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 71, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Commissioner of Internal Revenue against Estate of Louis Sternberger as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto fixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of January in the year of our Lord one thousand nine hundred and fifty-four, and of the Independence of the said United States the one hundred and seventy-eighth

[seal.] (S.) A. Daniel Fusaro,
*Clerk.*

☆ U. S. GOVERNMENT PRINTING OFFICE 954 254444 3-3

Office - Supreme Court, U. S.
FILED
MAR 4 1954
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

**October Term, 1953**

No. 674 24

COMMISSIONER OF INTERNAL REVENUE,
*Petitioner,*

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD S. GREENBAUM,
*Attorney for Respondent.*

*Of Counsel:*

WILLIAM F. WOLFF, JR.,
MAURICE C. GREENBAUM,
CHARLES E. HEMING.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth 2-0689

# INDEX.


| | PAGE |
|---|---|
| Statement | 1 |
| Reasons Why the Petition for Writ of Certiorari Should Be Denied | 2 |
| Summary | 2 |
| I.—There is no conflict between the First and Second Circuits | 3 |
| II.—The decision below is in accord with this Court's decision in Humes v. U. S. | 5 |
| III.—The decision below is in accord with the other cases cited by petitioner | 6 |
| Conclusion | 8 |


## CASES CITED.


| | |
|---|---|
| Blodget v. Delaney, 201 F. 2d 589 | 3, 4 |
| Burdick v. Commissioner, 117 F. 2d 972 | 3 |
| Davison v. Commissioner, 81 F. 2d 16 | 3 |
| Gardiner v. Hassett, 63 F. Supp. 853 | 4 |
| Henslee v. Union Planters Bank, 335 U. S. 595 | 6 |
| Humes v. U. S., 276 U. S. 487 | 2, 5, 6 |
| Ithaca Trust Company v. U. S., 279 U. S. 151 | 4, 7 |
| Knoernschild v. Commissioner, 97 F. 2d 313 | 7 |
| Meierhof v. Higgins, 129 F. 2d 1002 | 4, 8 |
| Merchants National Bank v. Commissioner, 320 U. S. 256 | 5, 7 |
| Newton Trust Company v. Commissioner, 160 F. 2d 175 | 3, 4 |
| Norris v. Commissioner, 134 F. 2d 796 | 7 |
| United States v. Fourth Nat. Bank in Wichita, Kan., 83 F. 2d 85 | 7 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 574

---

COMMISSIONER OF INTERNAL REVENUE,
*Petitioner*,

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
*Respondent*.

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

### STATEMENT.

Louis Sternberger died on June 25, 1947. He was survived by his wife, age 62, and an unmarried daughter, age 27, who had no descendants (R. 4-6). His Will provided that his residuary estate be held in trust during the lives of his wife and daughter, and that upon the death of the survivor one-half be paid to the daughter's descendants then living, and if there be none, to certain named charitable organizations (R. 5). An *inter vivos* trust, taxable in the decedent's estate, contained similar provisions (R. 5). The other half of the residuary estate is not involved in this proceeding.

The Tax Court, in accordance with the provisions of Section 812 (d) of the Internal Revenue Code, determined that the amount of the charitable bequest was deductible from the value of the gross estate. The amount of the bequest was found as a fact by the court. The Court of Appeals for the Second Circuit (Judges Learned Hand, Augustus N. Hand and Thomas W. Swan) unanimously affirmed this decision in a one sentence *per curiam* opinion.

When the decedent's wife and daughter die, the property here involved will all go to charity unless the daughter, who was unmarried, should have issue and the issue survive both her and her mother. It is petitioner's contention that, because the remainder is contingent, no deduction whatever should be allowed for this very substantial charitable bequest.

## Reasons Why the Petition for Writ of Certiorari Should Be Denied.

### Summary.

### I

**There is no conflict between the First and Second Circuits.**

### II

**The decision below is in accord with this Court's decision in *Humes* v. *U. S.***

### III

**The decision below is in accord with the other cases cited by petitioner.**

## I.

**There is no conflict between the First and Second Circuits.**

Petitioner asserts (p. 7) that the decision below "is squarely in conflict with the decision of the First Circuit in *Newton Trust Company* v. *Commissioner*, 160 F. 2d 175". He makes this assertion despite the fact that neither the Second Circuit nor the Tax Court deemed it necessary to distinguish *Newton Trust* in their opinions.

In *Newton Trust*, deduction of a charitable remainder was disallowed because it was impossible to value it at the date of decedent's death. This was so because during the intervening life estate the trustee had a broad power to invade the trust corpus and thereby divert it to non-charitable use by reason of a provision in the will which authorized the trustee "to make such payment or payments to or for the use and benefit of my said wife as it may in its sole discretion deem advisable" (p. 177). In the case at bar, the trust corpus was not subject to a power of invasion, and the value of the charitable remainder was ascertainable on the date of death. Indeed, that value was found as fact by the trial court (R. 8).

The First Circuit's decision in *Newton Trust* is in line with the Second Circuit's decisions in cases where the charitable interest could not be valued at the time of death. See for example *Burdick* v. *Commissioner*, 117 F. 2d 972 and *Davison* v. *Commissioner*, 81 F. 2d 16. In cases where the charitable interest can be valued both circuits allow the deduction. The First Circuit's recent decision in *Blodget* v. *Delaney*, 201 F. 2d 589, clearly illustrates this. In that case the decedent left the residue of his estate in trust with income payable to his sister for life and upon

her death, three quarters of the remainder to charities. The Will contained a provision authorizing the trustees to invade principal for the sister's comfort and welfare. The First Circuit found that the will contained a standard whereby the maximum extent of invasion could be measured and held that the charitable remainder was therefore capable of valuation and deductible. The court distinguished its previous decision in *Newton Trust* as a case where the charitable interest could not be valued because of the measureless character of the power of invasion.

Both the *Blodget* and *Newton Trust* cases involve powers of invasion. Even in this type of situation the value of the charitable remainder can be determined and deduction allowed if the standards governing invasion are "fixed in fact and capable of being stated in definite terms of money". *Ithaca Trust Company* v. *U. S.*, 279 U. S. 151 at p. 154. In cases like the one at bar which do not involve a power of invasion, valuation can much more readily be determined. Thus in *Gardiner* v. *Hassett*, 63 F. Supp. 853, the U. S. District Court for the District of Massachusetts ruled that a charitable remainder was deductible even though the charity would receive nothing unless the testator's brother survived both her niece and the niece's husband. The contingency there involved was of the same type as the one involved in the case at bar, and the Massachusetts District Court determined that the charitable remainder could be valued actuarially, citing the Second Circuit's decision in *Meierhof* v. *Higgins*, 129 F. 2d 1002.

The First Circuit's decision in *Newton Trust* is not inconsistent with the decision below. Both are affirmances of Tax Court decisions. In spite of its previous decision in favor of the Commissioner in *Newton Trust*, the Tax Court had no difficulty in deciding in favor of the taxpayer in the case at bar. The Tax Court saw no inconsistency between the two cases and there was none.

## II.

**The decision below is in accord with this Court's decision in Humes v. U. S.**

In *Humes* v. *U. S.*, 276 U. S. 487, this Court denied deduction of a charitable bequest payable only if an intervening life beneficiary died without issue before attaining the age of 40. The deduction was denied because the taxpayer had not presented any proof on the basis of which the trial court could value the charitable interest. As stated by this court at page 492:

> "The Court of Claims did not find that the present value of the contingent bequests to the charities can be determined by the calculations of actuaries based upon experience tables."

In an effort to overcome this defect the taxpayer asked this Court to take judicial notice of antiquated tables dealing with 4400 lives of female members and 1522 lives of male members of the Scotch peerage and apply them to a fifteen year old Texas girl, which of course this Court refused to do.

The facts of the *Humes* case and the findings of the trial court therein contrast sharply with the facts and the findings of the trial court in this case. In the case at bar the value of the charitable remainder was found as fact by the Tax Court. This valuation was prepared by a recognized firm of actuaries in accordance with established actuarial principles based upon known and reliable data (R. 6). The computation was reviewed and approved by an independent actuarial expert (R. 36-47; 59-60). As stated by the Tax Court:

> "Petitioner presented reliable and conservative actuarial testimony to estimate the value of the contingent remainder to charity at the date of decedent's death to support his deduction of $179,154.19. We do not feel that we are at liberty to disregard this testimony of competent actuaries who have made their computations in accordance with what appear to be well recognized actuarial methods" (R. 10).

The deduction was denied in *Humes* solely because of the lack of adequate proof on which valuation of the charitable interest could be based. If, as the petitioner contends, deduction was denied in *Humes* because the charitable remainder was contingent, it is submitted that this Court would have said so and disposed of the case on that ground.

## III.

**The decision below is in accord with the other cases cited by petitioner.**

Petitioner contends (pp. 12-13) that the decision below conflicts with two other decisions of this Court, *Merchants National Bank* v. *Commissioner*, 320 U. S. 256 and *Henslee* v. *Union Planters Bank*, 335 U. S. 595. In both of these cases the trusts authorized invasion of principal for non-charitable purposes. In both cases the charitable deductions were properly disallowed because it was obviously impossible to measure the extent to which the corpus would be diverted to non-charitable purposes. They furnish no basis for overruling the findings of the Tax Court in the present case. This Court clearly indicated in its *Merchants National Bank* decision (at p. 261) that even in

such a case, if the extent of invasion were governed by readily ascertainable standards the deduction would have been allowed. In *Ithaca Trust Company* (*supra*), a power of invasion case, this Court allowed deduction of the charitable remainder, because the standard governing invasion was "fixed in fact and capable of being stated in definite terms of money" (p. 154).

Petitioner also cites (p. 12) various lower court decisions for the proposition that no deduction may be taken for conditional charitable remainders. We are in accord with all of these cases. In none of them could the charitable interest be valued on the date of the decedent's death. In *Knoernschild* v. *Commissioner*, 97 F. 2d 213 (C. A. 7th), the trust corpus was subject to an immeasurable invasion for non-charitable uses; this decision is in accord with *Merchants National Bank* discussed *supra*. In *Norris* v. *Commissioner*, 134 F. 2d 796 (C. A. 7th), deduction of an alleged charitable "bequest" was denied on the ground that it was precatory. In all the other cases, conditions attached to the charitable bequests rendered them incapable of valuation on the date of death. They involved the type of situation covered by Section 81.46 of Treasury Regulation 105 to which petitioner refers in his brief. Typical of these cases is *United States* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85 (C. A. 10th), certiorari denied, 299 U. S. 575, in which decedent gave $100,000 toward a church building fund "upon condition that the church should contribute an equal amount, with other stipulations" (p. 86). Naturally, the deduction was disallowed because on the date of decedent's death it was impossible to value the charitable bequest. Such a situation is entirely different from the case at bar and certainly is not inconsistent with the decision below. As the Tenth Circuit stated in *Fourth Nat. Bank in Wichita, Kan.* (at p. 90):

> "* * * if the value of that contingent interest can be ascertained by reasonable methods or by recognized data as of the date of the death of a testator, the amount for deduction should be so determined and the deduction allowed."

Contingent charitable remainders are deductible if they can be valued on the date of death. As stated in *Meierhof* v. *Higgins* (*supra*) (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable market value, and in view of the published Treasury practice in handling interests subject to identical uncertainties the taxpayers properly based the amount of their claimed deductions on actuarial computations."

None of the cases cited by the petitioner are inconsistent with the decision below. The unanimous *per curiam* opinion of Judges Learned Hand, Augustus N. Hand and Thomas W. Swan affirming the Tax Court is sound and accords with the decisions of this court and the various circuits.

## CONCLUSION.

**It is respectfully submitted that the Commissioner's petition for certiorari should be denied.**

EDWARD S. GREENBAUM,
*Attorney for Respondent.*

*Of Counsel*:

WILLIAM F. WOLFF, JR.,
MAURICE C. GREENBAUM,
CHARLES E. HEMING.

Office - Supreme Court, U. S.
FILED
SEP 25 1954
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

**October Term, 1954**

No. 24

COMMISSIONER OF INTERNAL REVENUE,
*Petitioner,*

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR THE RESPONDENT.

EDWARD S. GREENBAUM,
*Attorney for Respondent.*

WILLIAM F. WOLFF, JR.,
MAURICE C. GREENBAUM,
CHARLES E. HEMING,
*Of Counsel.*

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

# INDEX.


| | PAGE |
|---|---|
| Question Presented | 1 |
| Statement | 2 |
| Summary of Argument | 3 |
| Argument | 6 |
| I.—The Decedent's Estate is Entitled to a Deduction Under Section 812(d) of the Internal Revenue Code for the Charitable Remainder | 6 |
| A. The Statute Authorizes the Deduction | 7 |
| B. The Decisions Hold that the Right to Deduct the Value of a Charitable Remainder Depends not on Whether it is Contingent or Vested, but on Whether it has an Ascertainable Value | 10 |
| 1. Supreme Court Decisions | 10 |
| C. The Treasury Regulations Authorize Deduction of Charitable Remainders if the Amount is Presently Ascertainable | 19 |
| II.—The Value of the Contingent Charitable Remainder as Found by the Tax Court was Conclusively Established by the Undisputed Evidence | 24 |
| Conclusion | 27 |

## CASES.

PAGE

Burdick v. Commissioner, 117 F. 2d 972, certiorari denied, 314 U. S. 631 ..... 17

Churchill v. United States, 68 F. Supp. 267 .....5, 18, 20
City Bank Farmers' Trust Co. v. United States, 5 F. Supp. 871, affirmed, 74 F. 2d 692 ..... 17

Davison v. Commissioner, 81 F. 2d 16 ..... 5, 17
Delaware Trust Co. v. Handy, 53 F. 2d 1042 ..... 17

Estate of Pompeo Maresi, 6 T. C. 582, affirmed 156 F. 2d 929 ..... 25

First Trust Co. of St. Paul State Bank v. Reynolds, 137 F. 2d 518 ..... 17

Gammons v. Hassett, 121 F. 2d 229, certiorari denied, 314 U. S. 673 ..... 17
Gardiner v. Hassett, 63 F. Supp. 853 ..... 16
Gaston Estate v. Commissioner, 2 T. C. 672 ..... 17
Graff v. Smith, 100 F. Supp. 42 ..... 18

Hallock v. Helvering, 309 U. S. 106 ..... 13
Helvering v. Richter, 312 U. S. 561 ..... 6
Helvering v. Union Trust Co., 125 F. 2d 401, certiorari denied, 316 U. S. 696 ..... 18
Henslee v. Union Planters Bank, 335 U. S. 595 ...11, 12, 13
Hoagland v. Kavanagh, 36 F. Supp. 875 ..... 18
Hormel v. Helvering, 312 U. S. 552 ..... 6
Humes v. United States, 276 U. S. 487 .....10, 11, 13, 25

Ithaca Trust Co. v. United States, 279 U. S. 151..4, 8, 10, 12, 13, 23

Knoernschild v. Commissioner, 97 F. 2d 213..... 17
Koshland v. Helvering, 298 U. S. 446..... 21

Manhattan General Equipment Co. v. Commissioner, 297 U. S. 129 ..... 21
Meierhof v. Higgins, 129 F. 2d 1002..3, 11, 14, 16, 18, 21, 22

PAGE

Merchants Bank v. Commissioner, 320 U. S. 256..4, 10, 12, 13, 17, 21, 22
Mississippi Valley Trust Co. v. Commissioner, 72 F. 2d 197, certiorari denied, 293 U. S. 604..... 17

Newton Trust Co. v. Commissioner, 160 F. 2d 175.. 18
Norris v. Commissioner, 134 F. 2d 796, certiorari denied, 320 U. S. 756 ..... 17

Robinette v. Helvering, 318 U. S. 184 ..... 25

United States v. Fourth Nat. Bank in Wichita, Kan., 83 F. 2d 85, certiorari denied, 229 U. S. 575.... 20
United States v. Provident Trust Co., 291 U. S. 272. 4, 10, 12, 13

Wood v. United States, 20 F. Supp. 197 ..... 18

Young Men's Christian Association of Columbus, Ohio v. Davis, 264 U. S. 47 ..... 7, 9

## STATUTES.

1954 Internal Revenue Code, Sec. 170 ..... 10
1954 Internal Revenue Code, Sec. 2037 ..... 26
Internal Revenue Code, Sec. 1141 (a) ..... 24
Federal Rules of Civil Procedure for the United States District Courts, Rule 52(a) ..... 24, 27
Technical Changes Act of 1949, Sec. 7, 63 Stat. 891 26

## MISCELLANEOUS.

T. D. 5906, 1952-1 Cumulative Bulletin 155 ..... 26
Treasury Regulations 80:
Art. 44 ..... 21
Art. 47 ..... 21
Treasury Regulations 105:
Sec. 81.10 ..... 7, 25, 26
Sec. 81.17 ..... 26
Sec. 81.44 ..... 19
Sec. 81.46 ..... 19, 21, 22

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 24

---

COMMISSIONER OF INTERNAL REVENUE,
*Petitioner,*

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Executor,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

## BRIEF FOR THE RESPONDENT.

This case involves a charitable deduction under the Federal Estate Tax. It arises from the Tax Court's rejection of the Commissioner's disallowance of the deduction in the decedent's estate tax return.

### Question Presented.

Whether, in computing the amount of the Federal estate tax, the decedent's estate is entitled to a charitable deduction under Section 812(d) of the Internal Revenue Code for the amount of a bequest of a contingent remainder to charity under which the charities will take unless the

decedent's unmarried daughter (age 27 at the decedent's death) should have issue which would survive both her and her mother.

## Statement.

Louis Sternberger died on June 25, 1947. He was survived by his wife, age 62, and a divorced daughter, age 27, who had no descendants (R. 6). Paragraph First of the Codicil to his Last Will and Testament provides that his residuary estate be held in trust during the joint lives of his wife and daughter and the survivor of them, and that upon the death of the survivor, one-half of the principal be paid to the daughter's descendants then living, and if there be none, to certain named charitable organizations (R. 5). An *inter vivos* trust created by the decedent, and concededly includible in his taxable estate, contained similar provisions (R. 5). The other half of the residuary estate is not involved in this proceeding.[1]

The amount of the charitable remainders, as of the date of decedent's death, was computed by competent and reliable actuarial experts (R. 6). That amount was deducted from the value of the decedent's gross estate to arrive at the taxable estate for estate tax purposes.

In his statutory Notice of Deficiency, the Commissioner denied the deduction, not on the ground now urged by him, but solely because the "actual present value cannot be determined by any known data" (R. 3-4). In the Tax Court, the Commissioner maintained the same position. His sole contention was that the charitable remainders were not susceptible to valuation from any known data (R. 65-6). The Tax Court rejected this contention, hold-

---

1. This other half could go to charity only if a large number of collateral relatives all predecease both decedent's wife and daughter. No deduction was claimed for this half because the amount of the charitable interest therein was *de minimis*.

ing that: "The value of a remainder interest contingent upon a person dying without issue may be measured by established and accepted actuarial principles based upon known and reliable data" (R. 6). It found that the present value of these remainders on the date of decedent's death was $.24058 per dollar of trust corpus (R. 10-11), and allowed the deduction.

On appeal the Commissioner interjected a new argument: that deduction of the charitable remainder should be denied because the remainder is contingent. The Court of Appeals for the Second Circuit (Judges Learned Hand, Augustus N. Hand and Thomas W. Swan) rejected the Commissioner's belated argument and unanimously affirmed the decision of the Tax Court.

## SUMMARY OF ARGUMENT.

### I.

The decision below correctly allowed a deduction for the amount of the charitable bequest as found by the Tax Court. Neither the statute, the cases, nor the regulations are authority for petitioner's novel and belated argument that "there may be no deduction for a contingent gift whether it is subject to accurate valuation or not" (Pet. Brief, pp. 7-8).

The right to deduct a charitable remainder depends not on whether it is vested or contingent, but upon whether it has an ascertainable value, *Meierhof* v. *Higgins*, *infra*.

When the decedent's wife and daughter die property valued at approximately three-quarters of a million dollars will go to charity unless the daughter should have issue and the issue survive both her and her mother (R. 3-5; 11). It is the petitioner's contention that because the charitable bequest is contingent, no deduc-

tion whatever should be allowed for this very substantial charitable bequest. Such a contention is squarely in conflict with the statute and is unsupported by the cases and the regulations.

A. Section 812(d) of the Internal Revenue Code prescribes a deduction for "the amount of all bequests" for charitable purposes. This clear and unequivocal language does not provide, as claimed by the petitioner, that the deduction is to be measured by "the amount the charity is unconditionally entitled to receive in the future" (Pet. Brief, p. 17). The right to deduct a charitable remainder is determined as of the date of death. There is no necessary correlation between the date of death valuation and the amount that may ultimately be received by the charity —"The tax is on the act of the testator, not on the receipt of property by the legatees." *Ithaca Trust Co.* v. *U. S.*, *infra*.

The purpose of the statute is to encourage charitable bequests. Petitioner's unprecedented attempt to limit the application of the statute, if sustained, would defeat this purpose.

B. This Court has upheld deductions for charitable bequests whenever the amount of the bequest is ascertainable. None of the cases cited by petitioner are authority for his assertion that no deduction is allowed for a contingent remainder. To the contrary, this Court very succinctly pointed out that "The whole question to be considered is—What is the value of the interest to be saved from the tax?" *U. S.* v. *Provident Trust Co.*, *infra*.

In *Merchants Bank* v. *Commissioner*, *infra*, the case on which petitioner principally relies, the charitable remainder was subject to a power of invasion. Because this power was not limited by any measurable standard, the charitable remainder could not be valued and deduction

was disallowed. This Court said (p. 259) that the case turned on whether the bequest had a presently ascertainable value.

The lower court decisions are in accord with the decisions of this Court. Where the amount of the bequest was not ascertainable the deduction was denied upon that ground. Most of the lower court decisions cited by the petitioner are of this nature. Typical of them is, *Davison* v. *Commissioner, infra,* where a charitable remainder could not be valued because the life tenant possessed a power of appointment whereby she could divert trust corpus to non-charitable uses.

C. The Commissioner's own regulations sustain the deduction. Section 81.44 provides for the valuation of charitable remainders. It says that if the contingency is such that the actuarial tables set forth in Section 81.10 do not apply, then the valuation of present worth must be made "in accordance with the provisions set forth in Section 81.10 by one skilled in actuarial computation". Ignoring this section, petitioner relies upon Section 81.46 which refers to transfers "dependent upon the performance of some act or the happening of a precedent event". This section, entitled "Conditional bequests", applies to the type of situation which arose in *Churchill* v. *U. S.* where the testator devised his farm to the city *on condition* that it be used as a park.

Petitioner argues that because the charities *may* get nothing, no deduction should be allowed. The Tax Court took this into account and did not grant a deduction for the *full* commuted value of the remainder. It assumed that the charities might not receive anything and accordingly granted deduction only for $.24058 per dollar of the trust corpus (R. 10-11).

II.

The value of the contingent remainder was found as fact by the trial court. It was conclusively established by the "reliable and conservative actuarial testimony" (R. 10) presented by taxpayer. The trial court's findings cannot be set aside unless "clearly erroneous". Rule 52(a), Rules of Civil Procedure.

## ARGUMENT.

I.

**The Decedent's Estate is Entitled to a Deduction Under Section 812(d) of the Internal Revenue Code for the Charitable Remainder.**

Neither the statute, the cases, nor the regulations are authority for the statement that contingent charitable remainders are not deductible. Yet this is the argument on which the petitioner now seeks to have this Court reverse the courts below. The weakness and invalidity of this argument is evidenced by the fact that the petitioner himself did not even mention it in his Notice of Deficiency or argue it before the Tax Court.[2]

The right to deduct a charitable remainder depends not on whether it is vested or contingent, but on whether it has an ascertainable value.

---

2. Petitioner acknowledges his complete shift of position on appeal (Pet. Brief, Footnote 2, p. 13). He attempts to excuse the belatedness of his argument by citing *Hormel* v. *Helvering*, 312 U. S. 552 and *Helvering* v. *Richter*, 312 U. S. 561. These cases both involved a special circumstance—a new decision by this Court during pendency of the appeal—which is absent in the present case.

**A. The Statute Authorizes the Deduction.**

The applicable statute is Section 812(d) of the Internal Revenue Code. Section 812 provides how the value of the net estate shall be determined. It says: "For the purpose of the tax the value of the net estate shall be determined • • • by deducting from the value of the gross estate" certain deductions. These include:

> "(d) The amount of all bequests, legacies, devises or transfers • • • to or for the use of any corporation organized and operated exclusively for • • • charitable • • • purposes."

Yet the petitioner says: " • • • there may be no deduction for a contingent gift whether it is subject to accurate valuation or not. In short, a bequest of a future interest to a charity is not deductible simply because it can be valued; it must also be shown that the possibility that charity will not ultimately take is so remote as to be negligible" (Pet. Brief, pp. 7-8).

The statute contains no limiting language such as suggested by petitioner's contention. It speaks of "all bequests" for charitable purposes and authorizes deductions of the amount of such bequests.

Petitioner argues that the deduction "depends upon the certainty of receipt by the charity" (Pet. Brief, p. 10). The statute does not so provide. The deduction is not based upon what the charity might ultimately *receive*, but rather upon the amount of the charitable *bequest*. As stated by this court in *Young Men's Christian Association of Columbus, Ohio v. Davis*, 264 U. S. 47 (at p. 50):

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death

duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death.

"Congress was thus looking at the subject from the standpoint of the testator, and not from the immediate point of view of the beneficiaries."

The unsoundness of petitioner's argument that deduction is measured by "the amount charity is unconditionally entitled to receive in the future" (Pet. Brief, p. 17) is graphically demonstrated by *Ithaca Trust Co.* v. *U. S.*, 279 U. S. 151. In that case, the decedent's wife, who was the life beneficiary of a trust having a charitable remainder, died in an accident, less than six months after her husband's death. Accordingly, the amount that charity was to receive was known when the tax was determined. But the tax was not calculated on that amount. This Court said at page 155:

"The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. * * * The tax is on the act of the testator, not on the receipt of property by the legatees * * *. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables."

The Commissioner himself, in Sections 81.10 and 81.44 of his Estate Tax Regulations 105, prescribes actuarial tables for use in determining the date of death value of charitable remainders. These tables set forth the com-

muted value of the charity's future interest, taking into account the estimated life expectancies of the life tenants. They do not even purport to value the amount the remainderman will actually receive. What the remainderman receives is always the market value of the trust corpus when the life interests terminate and not the date of death commuted value. The life tenant in all likelihood will not obligingly die on the date predicted by the tables. The market value of the trust corpus at that time is almost certain to vary from the value it had when decedent died. Regardless of subsequent market fluctuation and the actual longevity of the life tenant, the estate receives the same deduction. This is so because the deduction is computed as of the date of death.

The petitioner's argument that deduction of a charitable bequest is dependent upon receipt by charity has no basis in law. It is directly contrary to the plain language of the statute which provides for the deduction of *all* charitable bequests. It is also contrary to the statute's underlying purpose. This Court pointed out in *YMCA* v. *Davis, supra* (p. 50), that it was the intention of Congress:

> "to favor gifts for altruistic objects * * * by encouraging testators to make such gifts. Congress was in reality dealing with the testator before his death. It said to him:
>
> > 'If you make such gifts, we'll reduce your death duties and measure them not by your whole estate, but by that amount, less what you give.' "

The legislative intention to encourage charitable bequests is well established. This intention has been expressed by Congress in its special treatment accorded charitable contributions for purposes of income and gift taxes as well as estate taxes. The recently enacted 1954 Internal Revenue Code reaffirms this policy by increasing

the percentage limitation on charitable deductions for income tax purposes from 20% to 30% (1954 I. R. C. §170).

The petitioner's contention, if sustained, would "subvert the policy" of the statute. *United States* v. *Provident Trust Co.*, 291 U. S. 272, 286. As this Court said in that case (at p. 285):

> "We have for consideration simply a statutory provision exempting from a prescribed tax the value of all bequests, etc., made to or for the use of charitable organizations and those which are akin, plainly evincing a legislative policy to encourage such bequests."

The language of the statute is clear. It prescribes a deduction for the amount of all charitable bequests. It contains none of the limitations suggested by the petitioner's contention.

**B. The Decisions Hold that the Right to Deduct the Value of a Charitable Remainder Depends not on Whether it is Contingent or Vested, but on Whether it has an Ascertainable Value.**

1. *Supreme Court Decisions.*

The decisions of this Court support the unequivocal language of the statute. This Court has upheld the deductibility of charitable bequests whenever the amount of the bequest is ascertainable. It has never held that "there may be no deduction for a contingent gift" as claimed by petitioner (Pet. Brief, p. 7).

Petitioner relies upon five decisions of this Court to bolster his novel argument that contingent remainders are not deductible (*Humes* v. *United States*, 276 U. S. 487; *United States* v. *Provident Trust Co.*, *supra*; *Ithaca Trust Co.* v. *United States*, *supra*; *Merchants Bank* v.

*Commissioner*, 320 U. S. 256; and *Henslee* v. *Union Planters Bank*, 335 U. S. 595. No such argument was presented to this Court in any of these cases. None of them decided that contingent remainders are not deductible.

This Court denied deduction of the charitable remainder in *Humes* where the remainder was payable to charity only if the intervening life beneficiary died without issue before attaining the age of 40. The taxpayer had submitted tables dealing with 4440 lives of female members and 1522 lives of male members of the Scotch peerage and sought to apply them to a 15 year old Texas girl. This Court ruled that no valuation of the charitable bequest could be made from such data and therefore denied the deduction, stating at page 492:

> "The court of claims did not find that the present value of the contingent bequests to the charities can be determined by the calculations of actuaries based upon experience tables."

This is in sharp contrast to the case at bar where the value of the charitable remainder was found as fact by the trial court (R. 8). In our case the Tax Court found the valuation from "reliable and conservative actuarial testimony" (R. 10) presented by the taxpayer. This valuation was computed "by a recognized firm of actuaries in accordance with established actuarial principles based upon known and reliable data" (R. 6).

In *Humes*, the government did not argue and this Court did not hold that contingent bequests are not deductible. As the Court of Appeals for the Second Circuit stated in *Meierhof* v. *Higgins*, 129 F. 2d 1002 (at p. 1005):

> "Deductions were denied the taxpayer in cases like *Humes* v. *U. S.* because it was impossible to determine the 'amount' by any accredited method."

Petitioner also cites *United States* v. *Provident Trust Co., supra* (Pet. Brief, p. 28). That case involved the bequest of a charitable remainder contingent upon the death of decedent's daughter without issue. The taxpayer introduced evidence that the daughter, who was 50 years of age and had no issue, was physically incapable of giving birth to a child and consequently the *full* commuted value of the remainder was allowed as a charitable deduction. The allowance of the deduction in that case in no way suggested, as contended by petitioner, that a charitable deduction may not be taken unless the probability of the charity's not taking is so remote as to be negligible.

The other decisions of this Court (*Merchants Bank, Union Planters Bank,* and *Ithaca Trust*), all involved bequests of charitable remainders in which the intervening life estate was subject to a power of invasion. Petitioner in his brief lays great stress on *Merchants Bank,* citing it on numerous occasions (Pet. Brief, pp. 9, 10, 13, 14, 17, 19-21, 25, 27, 29, 30, 36). The issue in all three cases was whether the power of invasion was limited by a measurable standard so as to render the charitable remainder capable of valuation.

In both *Merchants Bank* and *Union Planters Bank* the standard of invasion was so vague and indefinite as to make the charitable remainder immeasurable. In *Union Planters Bank* the trustees could make withdrawals from corpus for the "pleasure, comfort and welfare" of the life beneficiary. The trustees in *Merchants Bank* were to consider the "welfare, comfort and happiness" of the decedent's wife.

The sole issue in both cases was whether the *amount* of the charitable bequest could be determined. In both cases the sole reason advanced by the government for denying deduction was that the bequest had no ascertainable value.

In both cases this Court held that the measureless character of the standards governing invasion precluded such valuation.

Neither of these decisions held or implied, as contended by petitioner, that "* * * deduction may not be allowed for a contingent bequest, regardless of whether it can be valued as of decedent's death" (Pet. Brief, p. 10). Indeed, this Court clearly indicated in its *Merchants Bank* decision (at p. 259):

> "The case * * * turned on whether the bequests to the charity have, as of the testator's death, a presently ascertainable value * * *."

This Court's answer to the question was given at page 261:

> "Since, therefore, neither the amount which the private beneficiary will use nor the present value of the gift can be computed, deduction is not permitted."

In *Ithaca Trust* the standards governing invasion were "fixed in fact and capable of being stated in definite terms of money" (p. 154). This issue of fact having been decided in favor of the taxpayer, the deduction was allowed.

The decisions of this Court cited by petitioner all support the deduction in the instant case. Where the bequest could not be valued, this Court refused the deduction (*Humes, Merchants Bank, Union Planters*). Whenever the *amount* of the charitable bequest could be ascertained this Court allowed the deduction (*Ithaca, Provident Trust*).

None of the cases offers support for petitioner's contention that contingent bequests are not deductible. As stated in *U. S.* v. *Provident Trust Co., supra* (at p. 286):

> "The whole question to be considered is—What is the value of the interest to be saved from the tax?"

To make the deduction turn on whether a future interest is contingent or vested is particularly inappropriate to the administration of modern tax law. The last vestige of tax distinctions based upon difference in form rather than substance went out with this Court's decision in *Hallock* v. *Helvering*, 309 U. S. 106.[3]

The deductibility of a charitable remainder is not dependent upon the label put on the future interest. The question is whether the present value of the bequest can be determined by reliable methods.

2. *Lower Court Decisions.*

Petitioner asserts that "* * * the lower courts * * * have repeatedly held that conditional charitable bequests are not deductible under Section 812 (d) of the Code and its predecessors" (Pet. Brief, pp. 30-1). This assertion is incorrect.

In the case at bar, the Court of Appeals affirmed the Tax Court's decision on the authority of *Meierhof* v. *Higgins*, *supra*.

---

3. Prior to *Hallock*, estate taxability of transfers with the possibility of reverter turned upon such subtle distinctions as the difference between transfers subject to a condition precedent and transfers subject to a condition subsequent. Such formal distinctions were cast out by the *Hallock* case where the Court said (at p. 118):

> "The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes."

In that case a remainder interest of Columbia University was contingent upon the death of a person 71 years of age prior to the deaths of persons aged 74 and 79.[4] The Court of Appeals for the Second Circuit ruled that the value of the contingent remainder to Columbia constituted a valid deduction, stating (at pp. 1005-6):

> "To say the trust was not created for charitable purposes because, under some circumstances, the gift to charity might fail, would import a meaning to the words which would disregard the long-established practice of valuing parallel interests by mortality tables for purposes of taxation.
>
> • • • • •
>
> "It seems unreasonable that in appraising the Meierhof trust the Commissioner should reject mortality tables reflecting precisely the same averages that he insists upon in the valuation of other interests the worth of which is likewise contingent upon the length of persons' lives. It does not seem unreasonable that as the taxpayer takes the risk of an underestimate of the amount of the charitable deduction due to the uncertainty of life, so the Treasury should take the risk of an excessive deduction."

---

4. Decedent's will created a trust with income payable to his sister (aged 74) for life. If upon the sister's death, the sister's husband (aged 79) should not then be living, the corpus of the trust was to be paid to the decedent's widow (aged 71) if then living and if not, to Columbia University. If the sister's husband should survive the sister, one-half of the fund was to be held in trust for the life of the husband with corpus payable to decedent's widow upon the husband's death or to Columbia University if the widow should not then be living. The other half of the fund was to be paid upon the sister's death to the widow, if then living, or if not, then to Columbia University.

The Court then summed up the law as follows (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable market value, and in view of the published Treasury practice in handling interests subject to identical uncertainties the taxpayers properly based the amount of their claimed deduction on actuarial computations."

The *Meierhof* decision was followed in *Gardiner* v. *Hassett*, 63 F. Supp. 853 (D. C. Mass.), where testatrix bequeathed the residue of her estate in trust with income payable to her niece for life and then to the niece's husband for life, and then the entire principal to testatrix's brother if then living, and if not, to charity. The Court sustained deduction of the charitable remainder which was valued actuarially.

Petitioner cites other lower court decisions at pages 31-2 of his brief as further authority for his contention that "conditional charitable bequests are not deductible under Section 812(d) of the Code and its predecessors" (Pet. Brief, p. 31). Instead of giving the facts of these cases, he synthesizes an apparently plausible argument by stringing together isolated sentences extracted out of context from several of them (Pet. Brief, pp. 33-34).

An analysis of these cases reveals that they are in full accord with the decisions of this Court. Thus the lower courts deny deduction where the amount of the bequest cannot be determined. In some instances the amount of the bequest was not established because the taxpayer failed to introduce adequate actuarial proof; in others the nature of the contingency made the charitable remainder immeasurable.

*Gammons* v. *Hassett*, 121 F. 2d 229 (C. A. 1st), Cert. denied 314 U. S. 673, and *Knoernschild* v. *Commissioner*, 97 F. 2d 213 (C. A. 7th), were power of invasion cases where the charitable deduction was denied because the standards governing invasion were immeasurable. See *Merchants Bank* and *Union Planters Bank*, *supra*.

In *Gaston Estate* v. *Commissioner*, 2 T. C. 672, *City Bank Farmers' Trust Co.* v. *United States*, 5 F. Supp. 871 (S. D. N. Y.), affirmed on other grounds, 74 F. 2d 692 (C. A. 2d), and *Delaware Trust Co.* v. *Handy*, 53 F. 2d 1042 (D. Del.), deduction was disallowed because there was inadequate proof from which the amount of the charitable bequests could be measured.

In *Davison* v. *Commissioner*, 81 F. 2d 16 (C. A. 2d), it was impossible to value the charitable remainder because the life tenant had a testamentary power of appointment over the trust corpus whereby she could divert the charitable bequest to non-charitable uses.

In *Burdick* v. *Commissioner*, 117 F. 2d 972 (C. A. 2d), cert. denied 314 U. S. 631, the testator bequeathed a sum of money to such educational institutions as his sister might select with a proviso that if she failed to designate within a year the legacy was to lapse into the residuary estate.

In *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518, (C. A. 8th), charity could get nothing without the consent of the decedent's wife.

In *Norris* v. *Commissioner*, 134 F. 2d 796 (C. A. 7th), cert. denied 320 U. S. 756, and *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197 (C. A. 8th), cert. denied 293 U. S. 604, deductions of alleged charitable "bequests" were denied on the ground that they were precatory and not bequests at all.

In *Helvering* v. *Union Trust Co.*, 125 F. 2d 401 (C. A. 4th), cert. denied 316 U. S. 696, testatrix directed that half of her estate go to the Girls Scouts provided that twenty years after her death the Scouts were still operating the country house the testatrix had given them, and on the further condition that the bequest be used for character building purposes.

In *Churchill* v. *United States*, 68 F. Supp. 267 (E. D. Wisc.), testator devised his farm to the city on condition that the city accept it and use it as a park.

While there is dicta in *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175 (C. A. 1st), supporting petitioner's contention, the decision was based upon the fact that the standards governing a power of invasion were measureless, thus rending the charitable interest incapable of valuation. There are also expressions favorable to petitioner's contention in *Wood* v. *United States*, 20 F. Supp. 197 (W. D. Ark.), *Hoagland* v. *Kavanagh*, 36 F. Supp. 875 (E. D. Mich.), and *Graff* v. *Smith*, 100 F. Supp. 42 (E. D. Pa.), but in the latter two there was also inadequate evidence in the record from which to base valuation of the charitable interest. In *Wood* v. *United States* the court refused to recognize actuarial evidence introduced by the taxpayer. We submit that this case was incorrectly decided.

With the exceptions noted, it is clear that the lower court cases, as well as the decisions of this Court, refute the petitioner's contention that contingent bequests are not deductible. The cases consistently allow deduction where the *amount* of the bequest can be determined, regardless of whether the bequest is vested or contingent. As stated in *Meierhof, supra* (p. 1006):

> "The right to deduct the value in a case like the present depends not on whether it is contingent or vested, but on whether it has an ascertainable value, • • •."

## C. The Treasury Regulations Authorize Deduction of Charitable Remainders if the Amount is Presently Ascertainable.

To support his contention that there may be no deduction for a contingent gift whether or not it is subject to accurate valuation (Pet. Brief, p. 7) petitioner relies on Section 81.46 of his Regulation 105 (Pet. Brief, p. 13, *et seq.*).

Section 81.44 of Regulations 105 entitled "Transfers for public, charitable, religious, etc. uses" provides that if a trust is created for both charitable and private use, deduction may be taken of "the value of the beneficial interest" of the charitable use "only insofar as such interest is presently ascertainable". It then states that Section 81.10 sets forth principles to be applied in determining the present worth of the deferred use and refers to the tables in that section which give figures for computing the value of a remainder interest after one life. Then this significant language appears:

> "If the present worth of a remainder bequeathed for charitable use is dependent upon determination of more than one life, *or in any other manner rendering inapplicable Table A or B of §81.10,* the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in §81.10, by one skilled in actuarial computations." (Emphasis supplied.)

This is precisely what the taxpayer did in the present case. But petitioner ignores this section and relies solely on Section 81.46 to support his contention that no deduction should be allowed for a contingent charitable bequest. He lengthily and stoutly defends the validity of this section (Pet. Brief, pp. 13-27). We do not dispute its validity. We do contend that it is inapplicable.

Petitioner relies on this section as authority for his proposition that for a bequest of a charitable remainder to be deductible, it must "be shown that the possibility that charity will not ultimately take, is so remote as to be negligible" (Pet. Brief, p. 8). This section entitled "Conditional bequests" (not "Contingent bequests") refers to transfers "dependent upon the performance of some act or the happening of a precedent event." Obviously this section is intended to apply to the type of situation which arose in *Churchill* v. *U. S. supra*, and *U. S.* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85 (C. A. 10th), cert. denied 299 U. S. 575. In the *Churchill* case testator devised his farm to the city *on condition* that it be used as a park and provided for a gift over to named legatees if or when it should cease to be so used. The court denied a deduction on the basis of Section 81.46 of the Regulations stating at page 269:

> "Because of the conditions attached to the devise and because of the possibility of charity failing to accept or, if accepting, failing to continue to maintain the tract as a park, the value, of the devise for public purposes could not be ascertained as of the date of decedent's death."

In *U. S.* v. *Fourth Nat. Bank in Wichita, Kan.*, decedent gave $100,000 toward a Church building fund "upon condition that the church should contribute an equal amount, with other stipulations" (p. 86). Here again the deduction was naturally disallowed. Such cases are totally different from the one at bar. In our case the deduction is a proper one because, as the court said in *Fourth Nat. Bank in Wichita* (at p. 90):

> "* * * if the value of that contingent interest can be ascertained by reasonable methods or by recognized data as of the date of the death of a testator,

> the amount for deduction should be so determined and the deduction allowed."

Petitioner's interpretation of Section 81.46 of the Regulation was unequivocally rejected 12 years ago in *Meierhof* v. *Higgins*, *supra*. In dismissing the identical contention which petitioner now makes, the Court of Appeals for the Second Circuit stated (p. 1005):

> "Article 47 [now sec. 81.46] must, however, be read in connection with Article 44 [now sec. 81.44] * * * The amount of Meierhof's bequest to Columbia was determined in accordance with practice long used by the Treasury and embedded in the Regulations. We see no reason for abandoning this established practice and find nothing in the Regulations to require such a departure."

Although the government did not seek certiorari in the *Meierhof* case, petitioner now contends that Section 81.46 bars the deduction. He is either interpreting this regulation incorrectly, or, if the regulation says what he contends, it is contrary to the statute and therefore invalid. An administrative agency's regulation is only the agency's own interpretation of the law. If it runs counter to the statute it must be disregarded. *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129; *Koshland* v. *Helvering*, 298 U. S. 446.

The petitioner recognizes that his interpretation of the Regulations was rejected in *Meierhof*, but he now contends that the decision of this Court in *Merchants Bank* requires a reversal of the *Meierhof* decision—even though the *Merchants Bank* case dealt with an entirely different question concerning a different portion of the Regulations. Because *Merchants Bank* was a power of invasion case it "specifically involved the *second* paragraph of Article 47 of

Treasury Regulations 80 * * * (identical with the second paragraph of the present Section 81.46 of Treasury Regulations 105) * * * " (Pet. Brief, p. 19). Despite this salient difference the petitioner reasons that the *Merchants Bank* case establishes the validity of the *first* paragraph of the same Regulations. This Court in the *Merchants Bank* decision did not even mention *Meierhof*. It did not decide or even consider the contention now made by the petitioner. It clearly stated the basis of its decision when it said (p. 259):

> "The case, * * * turns on whether the bequests to the charities have, as of the testator's death, a 'presently ascertainable' value * * *."

In cases like *Merchants Bank* which involve powers of invasion the question is whether the standards governing invasion are measurable. In cases like *Meierhof* and the one at bar, no such standards need be measured; the value of the charitable request can be determined actuarially.

Section 81.46 presupposes that if it appears that "the possibility that charity will not take is so remote as to be negligible" then "deduction is allowable" for the *full amount* of the charitable bequest. Petitioner argues as if a deduction for the full amount is sought in the present case (Pet. Brief, p. 26, *passim*).

The taxpayer here does not contend that charity's chance of not taking is so remote as to be negligible. Nor does the taxpayer contend that the estate should be given a deduction of the *full amount* of the commuted value of the charitable remainder. On the contrary, the taxpayer admits that there is a real possibility that the charities will not take. It is for that reason that instead of seeking deduction of the full commuted value of the charitable remainder, only a fraction of that amount is claimed. That

is the amount that the evidence shows was the present value of the charitable remainder.

Petitioner in effect argues that because the charities may get nothing no deduction should be allowed. He argues as if the Tax Court did not take this possibility into consideration. But it did. It did not assume that the charities were certain to receive. Had it done so it would have granted a deduction for the full commuted value of the remainder as of the date of death. It did not do this nor was such a deduction claimed. The Tax Court granted a deduction upon the assumption that the charities might not receive anything. Accordingly the deduction was only $.24053 per dollar of the trust corpus (R. 10-11).

This situation is completely different from the *Provident Trust* and other cases where deduction was granted for the full commuted value of the charitable remainder valued as of the date of death.

In the case at bar, even if the daughter had died without issue the day after her father's death, the estate would not be entitled to deduct the full amount received by charity but rather only the diminished value of the remainder. Regardless of subsequent events, the amount of the deduction is nevertheless determined actuarially on the date of death (*Ithaca Trust Co., supra*).

## II.

**The Value of the Contingent Charitable Remainder as Found by the Tax Court was Conclusively Established by the Undisputed Evidence.**

Petitioner's final contention is that "The actuarial computation accepted by the Tax Court and the court below as the amount of the deduction is no more than a guess as to value" (Pet. Brief, p. 37). Such a contention is entirely refuted by the record. The Tax Court said:

> "Petitioner [the taxpayer] presented reliable and conservative actuarial testimony to estimate the value of the contingent remainder to charity at the date of decedent's death to support his deduction of $179,154.19. We do not feel that we are at liberty to disregard this testimony of competent actuaries who have made their computations in accordance with what appear to be well recognized actuarial methods" (R. 10).

The trial court found as fact that the present value of the charitable remainders at the date of decedent's death was $.24058 per dollar of trust corpus.[5] These findings of fact cannot now be set aside unless they are "clearly erroneous", Rule 52(a), Rules of Civil Procedure for the United States District Courts; applicable to Tax Court's findings of fact, Sec. 1141(a), Internal Revenue Code of 1939.

---

5. The Court found that the date of death value of the remainders was $.24094 per dollar of trust corpus based on legitimate descendants only $.24058 including illegitimates, and $.18384 assuming that remarriage of decedent's daughter alone would defeat the charitable remainders (R. 8). The Court determined that the $.24058 figure should be used (R. 11).

Petitioner attempts to overcome the trial court's findings by citing *Robinette* v. *Helvering*, 318 U. S. 184 and *Humes* v. *United States*, *supra*. In both cases the trial court was unable to determine the value of the charitable interest owing to insufficient proof.

In *Robinette*, a gift tax case, this Court refused to "guess" at the value of a reversionary interest contingent upon the probability of issue to a 30 year old woman because of the taxpayer's failure to introduce evidence on this point. The record was entirely barren of actuarial proof. As indicated above (p. 11) the proof in the *Humes* case was also inadequate. See *Estate of Pompeo Maresi*, 6 T. C. 582, 586, aff'd 156 F. 2d 929 (C. A. 2nd).

The valuation of the charitable remainders in the case at bar was based upon the Combined Experience Mortality Table, prescribed in Section 81.10 of the Commissioner's Estate Tax Regulations; The American Remarriage Table, published by the Casualty Actuary Society, accepted as valid for estate tax purposes by the United States Treasury Department; and a table prepared in accordance with accepted actuarial principles based upon known and reliable data derived from the Vital Statistics of the United States, 1940, published by the Bureau of the Census (R. 7-8).

As indicated, the Combined Experience Mortality Table is prescribed by the Commissioner himself. In *Commissioner* v. *Maresi*, *supra*, a debt deduction was allowed under Section 812 (b) of the Internal Revenue Code for an estate's contingent liability to make payments to decedent's divorced wife until she should die or remarry, the valuation of which was based on the American Remarriage Table. The third table constituted a compilation of figures obtained from the United States Bureau of the Census; the identical experience data is employed in the new tables promulgated under Section

81.10 of Treasury Regulations 105 (T. D. 5906, 1952-1 Cum. Bull. 155). It is considered even more reliable than the American Remarriage Table (R. 39). As found by the Tax Court, this table was "prepared in accordance with accepted actuarial principles based upon known and reliable data"[6] (R. 7).

During the last five years Congress has twice recognized the value of actuarial principles and required them to be applied in the determination of estate tax liability. Section 2037 of the 1954 Internal Revenue Code reenacted Section 7 of the Technical Changes Act of 1949. This provides that an *inter vivos* transfer in which the grantor retains a possibility of reverter will not result in the inclusion of the transferred property in the grantor's estate if the value of the reverter does not exceed 5% of the total value of the property. The statute expressly states that the reverter shall be valued:

> "* * * by usual methods of valuation, including the use of tables of mortality and *actuarial principles.*" (Emphasis supplied.)

In construing this section, Section 81.17, Regulations 105 says:

> "Such value shall be ascertained according to *recognized valuation principles* applicable in determining the value for estate and gift tax purposes of future or *conditional* interests in property * * *." (Emphasis supplied.)

---

6. Even if this table were to be disregarded, the taxpayer would be entitled to a minimum deduction of $.18384 per dollar of trust corpus, the present value of the charitable remainders at date of decedent's death, assuming that the daughter's remarriage alone would defeat the charitable remainder (R. 8).

If the decedent's *inter vivos* trust in the present case had been irrevocable and contained a possibility of reverter to decedent or his estate (instead of providing for the remainder to charity) this provision of Section 2037 would apply. The Commissioner would then properly be urging that the evidence which he now attacks is conclusive proof of the taxability of the trust as part of the estate.

The value of the remainder has been fully established by the proofs submitted at the trial and found as fact by the Tax Court. These findings are clearly correct and cannot now be set aside (Rule 52(a) *supra*).

## CONCLUSION.

**The decision below is correct and should be affirmed.**

Respectfully submitted,

EDWARD S. GREENBAUM,
*Attorney for Respondent.*

WILLIAM F. WOLFF, JR.,
MAURICE C. GREENBAUM,
CHARLES E. HEMING,
*Of Counsel.*